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Printed for T. WALLER.

THE *Laws concerning Game*: Of Hunting, Hawking, Fishing and Fowling, &c. And of Forests, Chases, Parks, Warrens, Deer, Doves, Dove-cotes, Conies: And also of Setting-dogs, Grey-hounds, Lurchers, Nets, Tunnels, Low-bels, Guns, and all Manner of Engines and Instruments mentioned in the several Statutes to destroy the Game; shewing who are qualified by Law to keep and use them, and the Punishments of those who keep them, not being qualified. Likewise the proper Seasons allowed by Act of Parliament for Hunting, Fishing and following. Together with the Forest Laws: Shewing the Method of Chusing, and Oaths of the respective Officers; and the Authority, Power and Duty of Chief Justice in *Eyre*, Clerks of the Peace, Constables, Foresters, Game-keepers, Justices of Peace, Keepers, Lords of Manors, Parkers, Rangers, Regarders, Sheriffs, Stewards of Forest Courts, Stewards of Leets, Verderors, Wardens and Woodwardes. By WILLIAM NELSON of the *Middle Temple*, Esq; To which are now added, *English* Forms of Convictions, Declarations, Indictments, Justifications, Licences, Mittimus's, Pleas Warrants, &c. Digested under proper Titles, in an alphabetical Order. *The Sixth Edition*, with all the Acts of Parliament and Cases in Print, and also a large Collection of Manuscript Cases, down to the present Time.

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THE LAW OF EVIDENCE

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For Pemberton.



Trials per Pais.

V O L. II.

C H A P. XV.

Of Evidence (a) in general.

EVIDENCE, *Evidentia*: This Word in legal Understanding (saith *Coke*, 1 *Inst.* 283.) doth not only contain Matters of Record, as Letters Patent, Fines, Recoveries, Inrolments, and the like; and Wri-

(a) As the Discovery of Truth is of the utmost Consequence to the Good of Society, so it lays Men under the strongest Obligations, when called upon to give their Evidence, to adhere inviolably to Truth; and this is a Matter not only enjoined by the Precepts of Religion, but also by those of Reason; the Violation of Truth being a Sin against human Society, as it breaks in upon that Correspondence that is necessary to sociable Creatures, by destroying the End of Language, which is the common Tie and Band of Society; and as raising a different Idea in the Mind of the Hearer from that which is formed in the Mind of the Speaker, destroys all Intercourse between Mankind; so it prevents that Trust from being reposed in them which is so necessary to their own Preservation, and the good of others. 2 *Bac. Abr.* 284.

tings under Seal, as Charters and Deeds; and other Writings without Seal, as Court-rolls, Accounts, and the like, which are called Evidences, *Instrumenta*: But in a larger Sense, it containeth also *Testimonia*, the Testimony of Witnesses, and other Proofs to be produced and given to a Jury for finding of any Issue joined between the Parties: And it is called Evidence, because thereby the Point in Issue is to be made evident to the Jury: *Probationes debent esse evidentes (id est) perspicuæ & faciles intelligi.*

And this Evidence (with *Bracton*) we may term *probatio duplex*, viz. *viva*, as Witnesses *viva voce*; and *Mortua*, as by Deeds, Writings and Instruments; and *Violenta præsumptio*, in many Cases, is *plena probatio*; and therefore if all the Witness to a Deed be dead, then the Deed shall receive Credit *per collationem sigillorum scripturæ*, &c. but especially if there hath been a continual and quiet Possession; which is a violent Presumption, 1 *Inst.* 6. for no Man can keep his Witnesses alive.

If a Thing be generally referred to Proof, this shall be intended Proof by Jury; but if other Manner of Proof be agreed upon, that shall take away the Proof which the Law generally intends by Jury. *Hob.* 127. As if I promise to pay what Money you prove *B.* borrowed; this may be proved in the same Action brought upon the Promise. *Vide Roll. Tit. Trial,* 594, 595.

The Testimony of Witnesses *vivâ voce* is more effectual to discover the Truth than their Deposition in Paper, by confronting them one with another, and applying Questions for which they cannot be prepared. *Vin. Evidence,* 52.

Evidence, in legal Understanding, not only contains *Matter of Record*, as Letters Patent, Fines, Recoveries, Inrollments, &c. *Writings* under Seal, as Court Rolls, Accounts, &c. but in a *large Sense* it contains also the *Testimony of Witnesses*, and other Proofs to be produced and given to a Jury for the finding any Issue joined between the Parties; and it is called *Evidence*, because the Point in Issue is thereby to be made *evident* to a Jury: *Proofs* ought to be perspicuous and easy to be understood. *Ibm.*

Evidence to a Jury is what may be given in Evidence, as by *Parol Ore tenus*, or by *Writing*; but nothing can be *delivered* in Evidence to a Jury, but what is of *Record* or *under Seal*, without Consent. *Ibm.*

It is only given for the Information of Conscience, yet if no Evidence be given on either Side, the Jury may notwithstanding find a Verdict either for Plaintiff or Defendant, and even though the Evidence be given *exclusive*, they may find against it, and hazard an Attaint if they please. *Ibm.*

Evidence *vivâ voce* is always best; and tho' the Law requires the *best Proof* that can be had, yet, when that cannot be had, it is satisfied with that which can. Evidence which is *contrary* to the *Matter in Issue*, or which is not agreeable to it, is not good; but where the Evidence proves the *Effect* of the Issue, it is good; and it suffices to prove the *Substance* without any precise Regard to the Circumstances. *Ibm.*

In Case, the Declaration was for delivering Goods not merchandizable, *knowing* them to be naught, this *Sciens* need not be proved in Evidence. *Viner, Trial, 348.*

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Of Evidence in general. Ch. 15.

There is a Difference between Pleas of *Performance* and Pleas in *Excuse*; in the *latter* the Party is bound to prove it as *pleaded*, but not in the *former*. *Ibm.* 349.

Always when a Man pleads the *General Issue*, if his *Evidence* stands with his *Issue*, and proves it, the *Evidence* is good; but otherwise, where the *Evidence* doth not prove it. *Ibm.* 352.

In a Writ of *Right*, if the *Mise* be joined upon the *meer Right*, a *collateral Warranty* cannot be given in *Evidence*, for he hath no *Right* to it, it therefore ought to have been *pleaded*. *Ibm.* 354.

In *Trespas*s, the Defendant pleads that the *Place where*, &c. is his *Freehold*, and gives in *Evidence* a *Fine* with *Proclamations*; this is good *Evidence*, because it is a *Title*. *Ibm.*

So in false *Imprisonment*, if the Defendant justifies by Warrant made *after* the *Arrest*, the Plaintiff may reply *de injuriâ suâ propriâ*, &c. And give the *Matter* in *Evidence*. *Ibm.*

A *Fact* alledged to be done on a *particular Day*, when no *Fact* was done, if it fall out upon the *Evidence*, that the *Fact* was done before the *Action* brought, it is sufficient. *Ibm.*

If the *Point* in *Issue* be a *bare Agreement*, or simple *Contract*, without complex *Matter*, and the *Evidence* proves an *Agreement Special*, yet this is good: So of a *Feoffment absolute*, and the *Proof* is of a *Feoffment conditional*. *Ibm.*

A *Deed* of *Feoffment without Livery* may be given in *Evidence* as a *Release*. *Ibm.*

Where

Where a Demise is pleaded to Husband and Wife, a *Fine sur Release* to them, is no Evidence to prove the same; but in an Action on the Case by the Husband of an *Assumpsit* made to him; if the Evidence be that the *Assumpsit* was made to the Wife, and that he did agree to it, this is good. *Ibm.* 357.

When an Information or Action is brought upon any *Statute*, if the Defendant be *discharged* by any *Proviso therein*, he may give it in Evidence; but if it be any *Foreign Matter*, even though it be a Licence pursuant to a *Proviso of the Statute*, he must plead it; *per Turner J.* though *Hale* said, that a Licence pursuant to a *Proviso* was the same as a *Proviso*, and might be given in Evidence. *Ibm.* 359. See *Roll. Trial*, 683. *pl.* 11. and 2 *Roll. Rep.* 92.

In Affize, if the Tenant pleads *Nul Tort nul Disseisin*, he cannot give a Release *after* the Disseisin in Evidence; but he may give in Evidence a Release *before* the Disseisin, for then upon the Matter there is no Disseisin.

In Trespass by the Warden of the *Fleet*, and Not guilty pleaded, it is good Evidence to say he was *not* Warden. *Ibm.*

In Case, founded upon an Injury done, every Thing that shews that the Defendant did what he might *lawfully* do, may be given in Evidence upon a *Not guilty*, for that proves he had done no Injury.

So upon a *Non assumpsit*, *Non dimisit*, or *Non detinet*, being in Issue, every Thing may be given in Evidence which *disaffirms* the Contract, for that goes to the Gift of the Action; for since there is no Contract to be performed at the Commencement of the Action, there could therefore be no Trespass for Non-performance

of it; a *Release* therefore goes to the *Gift* of the Action, for it shews there was *no Contract* at the Time the Action was commenced.

For as in *Trover* the Plaintiff claims a Right to the Thing he declares on, therefore *every Thing* that shews the Contract to be void, as *Nonage*, or more Money lost at Play than the Statute allows of, may be given in Evidence on the General Issue; for on a *void Contract* the Plaintiff hath no Right to any Remedy; this therefore, and the like, goes to the *Gift* of the Action.

Nota; That the *Gift* of the Action is the *Fraud* and *Delusion* that the Defendant hath offered the Plaintiff in not performing the Promise he had made, and on relying on which the Plaintiff is hurt; and therefore what goes to shew that there was *no Contract*, or that it was *performed* or *paid*, or *released*, or that there was *no Consideration*, or discharged, goes to the *Gift* of the Action, because there could be no *Fraud* or *Delusion* to the Plaintiff at the Time of the Action brought, nor could he rely on that which had *no Being*; these Matters therefore need not be pleaded but may be given in Evidence on the General Issue. *Vin. Trial*, 359.

When a Man can have Advantage of the *Special Matter* by Way of *Pleading*, he shall likewise in the *Evidence*; as for Instance, the Rule of Law is, that a Man cannot justify the Killing or Death of another, and therefore in that Case he shall be received to give the *Special Matter* in Evidence, as that it was *se Defendendo*, or in *Defence of his House*, or in the

the Night against Thieves and Robbers. *Ibm.*
362.

If an Attachment and Condemnation be, before a Writ purchased, it may be given in Evidence upon the General Issue, because it is an Alteration of the Property before Action brought. *Ibm.*

Per Cur. If an Executor suffer Judgment to go against him by *Default*, upon executing a Writ of Inquiry he is estopped, and shall not give the *Want* of *Assets* in Evidence, as if it had been in the Case of an Heir, for he should have pleaded *plene Administravit*, or specially what *Assets* he had, *et non ultra*. *Vin. Evid.* 61.

When once a Person hath entred upon Evidence by *Deed*, if he fail in his Evidence, he cannot afterwards go to *parol* Evidence of *that Fact*. *Ibm.*

When a *Release* is pleaded it must be *produced* in Evidence, for the Court is to judge of its Force in Law; but where Charters are *lost or burnt*, in such Cases of *Necessity* the Law allows a Proof then without producing them. *Ibm.*

A Lease made upon an Outlawry produced in Evidence to prove a Title, the *Outlawry itself* must also be produced, for that is the Ground of the Lease, and by Consequence of the Title; but if the *Lease* be produced to prove *other Matter* he need not produce the *Outlawry*, but may have the *Lease* only read in Evidence, though in both Cases the Lease must be proved. *Ibm.*

So it is of an *Extent*, the Plaintiff must shew on what the Extent is grounded: So in *Debt for Rent* upon a *Lease parol*, and *Nil debet* pleaded, the Plaintiff must shew his Title to

the Land; but *contra* upon a Lease *under Seal*, for the Defendant is estopped by his Acceptance and Sealing a Counterpart. *Ibm.*

So in Debt for Tithe by a *Parson*, he must prove his *Institution* and *Induction*, and Reading the 39 *Articles*, for this is his Title to the Tithe. *Ibm.*

The Sheriff, upon an Assignment of a Bail-Bond doth not *part with* the Bond, because he is to be *indemnified* if the Plaintiff be nonsuit, but he must produce it at the Trial. *Ibm.* 62.

Consequential Damages may be given in Evidence in an *Action on the Stat. against suing in the Admiralty*, though not mentioned in the Declaration; as, that he *lost the Profits* of his Voyage. *Ibm.* 76.

When you have a *good Matter* in Bar, and an Opportunity to plead it, you shall not give it in Evidence. *Ibm.*

In all Cases, where a Man *admits* the Action were it *not for special Matter*, that Matter may be specially pleaded; though it may likewise be given in Evidence on the General Issue. *Ibm.* 77.

It is *not* a Rule, that because a Matter *may* be given in Evidence, that therefore it *must not* be pleaded specially; for it very often happens to be in the Election of the Defendant either to plead it specially or not, as he shall be advised. *Ibm.*

Where the Matter of the Plea confesses the Cause of Action, but *avoids*, &c. the Defendant may there plead specially, though he might have given it in Evidence; but otherwise where the Matter of the Plea doth not *avoid*, but *deny*. *Ibm.*

Where

Where there is a special Matter to avoid the Plaintiff's Action, which the Defendant *cannot* give in Evidence upon the General Issue, he must then plead it specially: So, where there is a *meer Matter of Fact*, to avoid the Plaintiff's Action it may be given in Evidence on the General Issue; but if the Matter of Fact contains likewise *Matter of Law*, the Defendant may either plead specially or generally, and give the special Matter in Evidence. *Ibm.* 78.

It was originally but an Indulgence to give Accord with Satisfaction in Evidence upon *Non assumpsit* pleaded, but it hath crept in, and is now settled.

Debt for Rent upon Demise, *Nil debet* as to Part, and *Nil habuit in Tenementis* as to other Part, this is ill, for in Construction of Law, *Nil habuit, &c.* goes to the whole, and *Nil debet* makes the Plea double, and on *Nil debet*, *Nil habuit, &c.* might have been given in Evidence, but by pleading *Nil debet* the Demise is admitted; and then by adding *Nil habuit* it is repugnant. *Ibm.*

Coverture, Infancy, &c. may be given in Evidence upon the General Issue; but upon a Not guilty in Trespas *Quare clausum fregit*, a *Highway* cannot be given in Evidence. *Ibm.* 79, 80.

Where a *general Jurisdiction* is given by *Statute*, and a Proviso excepts particular Persons or Things, all those may be given in Evidence; for if the Party or Thing is not within the Act, the Person accused is Not guilty; but where the *Jurisdiction is limited*, and confined to particular Persons or Things, with a Proviso of Exception, this must be pleaded, and you must

must shew how the Person or Thing is within the Act. *Ibm.*

Whatever is a *Discharge* of the Action may be given in Evidence, as a Release, &c. and whatever Promise is made by Parol, may be discharged by Parol. *Ibm.* 80.

In a Declaration about a Seat in a Church, you need not alledge the Repairing of the Pew, but upon the Trial you must prove it. *Ibm.*

In Felonies, &c. heretofore the Persons that gave Evidence for the Prisoner against the King were not sworn; but see *Siderfin* 211. and Stat. 7 *W.* 3. c. 3. and Stat. 1 *Ann.* c. 9. and the Law now is, that they shall be sworn.

B. was indicted for striking *F.* in *Westminster-Hall*, and the Witnesses that gave Evidence for *B.* were admitted to be sworn.

And so the Defendant's Witnesses in Appeal of Murder. And the Court would not allow Evidence upon Oath, given upon the Indictment, although the Witness was dead; nor is Evidence upon the Indictment of Trespas Evidence upon an Action of Trespas.

Upon Indictments and Informations concerning Criminal Offences, as against a Justice for compounding of Recognizances, &c. upon Motion the Court will order the Prosecutor to give particular Instances, that the Defendant may know what to defend. *Keb.* 2 Part 220.

A Jew being a Witness, is sworn on the *Old Testament*, and Perjury upon the Statute 5 *Eliz.* cap. 9. may be assigned upon this Oath; so if it be taken on the Common-Prayer Book, that hath the Epistles and Gospels. *Keb.* 2 Part 314. *Hill.* 19, 20 *Car.* 2. *B. R.*

Proofs to determine Matter of Fact, and to be offered to a Judge and Jury, are of two Sorts. First *Living*, as by Witnesses, and to a Jury one Witness is sufficient. And *dead*, as Matters of Record, as Letters Patent, Fines, Recoveries, Inrollments, &c. Writings sealed and delivered; and Feoffments, Leases, Releases, &c. And without Seal, as Court-Rolls, Accounts, &c. And if the Case be between the King and a Prisoner, he is first to say what he can for himself, and then all that can say any Thing against him are to be heard upon Oath, and then others may be heard for him: And according to this Evidence on both Sides, or without any Evidence at all, the Jury are to give their Verdict, according to their Knowledge and Oath.

The Jury are obliged to take Cognizance of what is sufficient Evidence, on Pain of an Attaint.

Payment Time out of Mind, is good Evidence of an Endowment.

Where the Evidence proves the Effect and Substance of the Issue, it is good.

In Challenge to the Array, because made at the Denomination of the Sheriff's Clerk, Evidence at his Bailiff's Denomination is good, because favourably made is the Substance. 38 H. 6. 9.

Upon the General Issue the Defendant may give any Thing in Evidence, which proves the Plaintiff hath no Cause of Action, or which doth entitle the Defendant to the Thing in Question.

But if he hath Cause of Justification or Excuse, it must be pleaded; wherefore upon *Non detinet*

detinet in *Detinue*, the Defendant may give in Evidence a Gift from the Plaintiff; for that proveth that he doth not detain the Plaintiff's Goods; but he cannot give in Evidence that the Goods were pawned to him for Money, and that it is not paid, but he must plead it. 1 *Inst.* 283. For the Property is in the Pledger.

Waste was assigned in *Boscis in succidendo & vendendo decem Quercus*. The Defendant in Fact had only lopped them; held he might plead *Nul Waste fait*, and give this special Matter in Evidence. *Dyer* 92. *pl.* 16.

Waste was assigned in *fodiendo fossam in quodam Prato*. The Defendant pleaded *Nul Waste fait*, and the Jury found the Defendant made the Trench to drain the Water, whereby the Ground was better'd, and not damag'd. *Obj.* That this ought to have been pleaded, but it was held, it might be given in Evidence, being no Waste. *Dyer* 361. *b.* *pl.* 12.

Upon the Plea, *Nul Waste fait*, in an Action of Waste, he may give in Evidence any Thing that proved it no Waste; as by Tempest, by Lightning, by Enemies, &c. But he cannot give in Evidence any justifiable Waste, as to repair the House, or the like; nor a Reparation of the Waste before the Action brought. For the Rule is, That the Evidence must stand and agree with the Issue. 1 *Inst.* 283. See *Gilb. L. of Evid.* 274. So the Defendant may give in Evidence, that the House was burned by Accident, for this is no Waste, because it cannot be supposed within the Party's Power to prevent. *Gilb. L. of Evid.* 274.

Waste.

If

If a Man bring an Action of Waste, upon the General Issue of *Nullum fecit Vastum*, the Defendant cannot give in Evidence that the Houses were repaired, and the Waste set right before the Action brought, for this confesses the Waste and avoids the Action, by shewing that it is not lawful for the Plaintiff to bring his Action where the Injury is already redressed, and on the General Issue, the Plaintiff denies any cause of Action. *Gilb. L. of Evid. 273, 4.*

So upon this Issue the Defendant cannot give in Evidence a Licence to cut down Trees; for this is to confess, and not to deny the doing of the Waste. *Gilb. L. of Evid. 274.*

If the Defendant cut Timber, and lay it out in Repairs, he cannot give that in Evidence on the General Issue, but he ought to plead it specially; for this Evidence confesses and avoids the Declaration, and it admits the Fact of the Declaration, but brings those Circumstances in, which shew the Fact may be lawfully done; and therefore the foregoing Reasons ought to be offered to the Court. *Gilb. L. of Evid. 274.*

Objection: But it may be said that this Evidence falsifies the Declaration, inasmuch as it proves that the cutting of the Timber is not the Disinheritance of the Lessor, and so it may be given in Evidence on the General Issue.

Answer: If you admit any Fact, you allow all the Consequences of that Fact; now when the Defendant's own Evidence do attest the cutting of the Trees, he must allow the Consequences of that Fact, when it is to the Lessor's Disinheritance; for on the Issue nothing but the Truth of the Fact in the Declaration can be called in Question; you cannot therefore on this Issue allow the Truth of the Fact, and yet offer

offer it to the Jury, and deny all the Consequences of the Law attending upon the Fact, for that is improper to the Jury, who are not Judges of the Law, and therefore must be offered to the Court who are, and consequently notwithstanding this Objection ought to be pleaded. *Gilb. L. of Evid.* 275.

Upon Not guilty, in an Action upon the Statute *de parco fracto*, That the Plaintiff hath no Park, is good Evidence. 19 *H.* 8. 9. *Roll. Trial*, 683. *pl.* 6.

If the Defendant pleads Payment to a Bond or Bill, and it appears the Debt is very old, and it hath not been demanded, nor any Use paid for many Years, a common Presumption is good Evidence, that the Money is paid, and the Juries use to find for the Defendants in such Cases.

Evidence shall never be pleaded, but the Matter of Fact shall be pleaded; and if it be denied, the Evidence shall be given to the Jury, not to the Court. *Lib.* 9. 9.

Estate for
Life.

Evidence, that the Wife of every Copyholder shall have the Land *durante viduitate*, will not maintain the Issue, that the Custom of a Manor is, That she shall have the Land during her Life, after her Husband's Death, because, though *durante viduitate* imports an Estate for Life, yet an Estate *durante vita*, is more large and beneficial. *Lib.* 4. 30.

What may be
given in Evi-
dence.

Things done *before* the Memory of Man in another County, or in another Kingdom, may be given in Evidence to a Jury, as Assets in another County, &c. *Moor* 47. See *Lib.* 4. 22. 9. 27, 28, & 34. *Lib.* 6. 46, 47.

Ch. 15. *Of Evidence in general.*

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Copy of a Record may be read at a Trial for a malicious Prosecution, though not ordered by the Court. 2 Str. 1122.

Upon Issue, *Payment at the Day*; Payment before or after the Day is no Evidence, Moor 47. but upon *Nihil debet*, it is good Evidence, because it proves the Issue.

In Attaint, the Plaintiff shall not give more Evidence, nor examine more Witnesses, than was before; but the Defendant may. Dyer 212.

In Actions upon the Case, Trespass, Battery, or false Imprisonment, against any Justice of Peace, Mayor or Bailiff of City or Town Corporate, Headborough, Portreeve, Constable, Tithingman, Collector of Subsidy or Fifteen; in any of his Majesty's Courts at *Westminster*, or elsewhere, concerning any Thing done by any of them, by Reason of any of their Offices aforesaid, and all other in their Aid or Assistance, or by their Commandment, &c. They may plead the General Issue, and give the special Matter of their Excuse or Justification in Evidence. 7 Jac. cap. 5.

Special Evidence upon the General Issue, by whom.

Prohibition for suing for Tithes in *Bocking-Park* in *Essex*, and surmised, that the Lands were Parcel of the Possessions of the Priory of *Christ-Church* in *Canterbury*, and the said Prior and his Predecessors had held it discharged of Tithes *tempore dissolutionis*, and pleaded the Statute of 31 H. 8. The Defendant pleads that the Prior and his Predecessors did not hold them discharged, and upon Issue joined thereon, the Evidence was, That the Prior or his Predecessors, Time out of Mind, &c. never paid Tithes; but no Cause was shewn, either by Unity of Possession, real Composition, or other

A non decimando.

In *Nil debet*, upon the Statute for Tithes, a Lay Person cannot give a *Non decimando* in Evidence; but so may the King and any other spiritual Persons. *Lib. 2. Bp. of Winchester's Case.*

other Cause, to shew it discharged: *Cook* said it was no Evidence, for it is a Prescription *in non decimando*. *Curia contra*; for a spiritual Man may prescribe *in non decimando*, and by the Statute of 31 *H. 8.* he shall hold it discharged as the Prior held it; and if he held it discharged, *non refert* by what Means; for it shall be intended by lawful Means, and the Jury afterwards found it for the Plaintiff. *Cro. 3 Part 2, 6. Keb. 2 Part 45.*

Suit in the Spiritual Court for Tithes, Defendant pleads, That Plaintiff did not read the Articles; and held that Defendant must prove this, tho' a Negative: For, says the Book, the Law presumes that none would lose his Benefice rather than read the Articles. *1 Roll. Rep. 83.*

In Ejectment for a Rectory, the Lessor of the Plaintiff must prove not only his Admission, Institution and Induction, but also his Reading the Articles, and subscribing them, and his declaring his full and free Assent to the Book of *Common Prayer*, within the Time limited by the Statute. *1 Sid. 220.*

Affidavit of one convicted of Forgery, not to be read to support a Complaint. *2 Stra. 1148.*

A Church-Book is no Evidence. *Brownlow's 1 Part 107. Postea. 26 Aff. pl. 4.*

If a Church-Book, or any Thing else be given in Evidence, which ought not to be allowed, the Court above cannot quash the Verdict, except it be certified and returned with the *Postea*. *Brownlow's 1 Part 207.* But the Court may order a new Trial, upon cause shewed, as for excessive Damage, &c.

The Court will not permit the Jury to carry any Writings out with them, but what are proved, and under Seal.

The Certificate of the King under his Sign Manual, was allowed in *Chancery* for Proof without Exception. *Hob. 213.*

Upon a Traverse of a Lease Parol for Years, viz. *Absque hoc, quod A. dimisit, &c. Nihil habuit in tenementis* may be given in Evidence. *Dyer 122.*

Shewing a Grant to dig Turfs, is no Evidence against a Prescription for the same, but the Grant being the same with the Prescription, shall be taken as a Confirmation. *Crew and Vernon, Moor 819. Quære tamen, vide Moor 830.* Where a Court of *Piepowder* is claimed by Prescription and Grant, and good. *2 Cro. 313. Acc.*

The Confession of a Party must be taken whole, and not by Parts; as if to prove a Debt, it be sworn that the Defendant confessed it, but withal he said at the same Time, that he paid it; his confession shall be valid as to the Payment, as well as that he owed it; *per Hale* Chief Justice. And so is common Practice.

The Jury are to decide the Fact, and Evidence is not given but to inform them in their Conscience of the Truth; for although no Evidence is given of either Side, yet they may give their Verdict of one Side or other. *14 H. 7. 29.* And therefore, although two Witnesses are necessary, where the Trial is by Witnesses, as in the Civil Law; yet they are not of Necessity, where the Trial is by Jury. And where Witnesses are joined with the Jury, yet they may be rejected, if they will not agree

with the Twelve, and the Twelve may give their Verdict. *Roll. Trial*, 675.

Ibid. 676. *pl.* 7. The Jury, after they are departed from the Bar, may return and hear their Evidence of any Thing they doubt before the Verdict.

Done in tayle. *Sur Traverse de done in Tayle*, the Witnesses prove, That another made the *Done*; this doth not Warrant the Issue. *Ibid.* *pl.* 13.

In an Action against the Sheriff upon the Statute of Extortion, that he took it for *Extortion* *vers. vic. Fee.* Bar-fee of one who was acquit, is good Evidence.

Possession. Possession is an Evidence of Right, and he that hath Possession may distrain the Cattle of him that hath no Title, for the Taking is in respect of the Possession more than of the Title. *Roll. Trial*, 679. *pl.* 19.

A Receipt of the last half Year's Rent is Evidence that all before was paid.

Parson. Parson or not Parson, in such Issue you may give in Evidence a Resignation, although it be in another County and Spiritual. *Roll. Trial*, 677. *pl.* 28.

Fait. In *Riens passe per le fait*, not his Deed may be given in Evidence.

In Waste, the plaintiff declared of a Lease by *J. S.* to the Defendant, whereby *J. S.* granted him the Reversion, to which the Defendant attorned; and the Question was whether if the Defendant pleaded *Ne granta pas*, or *Riens passa per le fait*, he could give in Evidence, that he never attorned to the Plaintiff? *Shelly* thought he could not, but that he ought to traverse the Attornment; but *Knightly* and *Fitzherbert* thought he might in either Case. *Dyer* 31. *pl.* 215.

To lay a Custom to a House and Land, Custom.
to prove it to Land only, not good. *Godbolt*
234.

'Tis good Evidence to convict one upon the
Statute *Eliz.* for not coming to Church, to Church.
prove that the Party was not at his Parish
Church such a Sunday, and the Party may shew
that he was at Church elsewhere.

After Evidence given, and the Jury ready *Former Trial;*
to give their Verdict; and then the Attorney
General will not proceed, but draws a Juror,
and brings another Information, none of the
former Jurors shall be admitted to give in E-
vidence, that the Jury were ready to give their
Verdict against the King in the first Informa-
tion; for this ought not to be discovered, for
so no Benefit would accrue to the King by
his Prerogative to draw a Juror. *Roll. Trial,*
679. *pl.* 10.

But this may be given in Evidence in
another Action, where the King is not con-
cerned. What may be
given in Evi-
dence upon a
special Issue.

Upon an Issue of Common appendant, &c. Common.
common pur cause de vicinage cannot be given in
Evidence. *Roll. Trial,* 680. *pl.* 2.

If an Advowson be pleaded to be granted *Grant per fait;*
per fait, and this Issue is taken by a Stranger where it is
to the *Fait*, if it be found granted *sans fait*, sufficient to
or by another *Fait* it is good; for the Deed prove the
is Surplus, and the Effect of the Issue is up- Effect of the
on the Grant, not upon the *Fait*. *Ibid.* 651. Issue.
pl. 1.

If a Man plead Not guilty, he cannot give What Things
in Evidence a Matter justifiable, which shall may be given
be a Confession of the Act, for this is con- in Evidence
trary to the Issue. As *Son assault demesne* in upon the Ge-
Battery upon Not guilty: But upon Not guilty neral Issue.
Trespass.
in Battery.

in Trespafs for beating one's Servant, *per quod servitium amisit*, you may give in Evidence, that the Plaintiff did not lose his Service by the Battery. *Roll. Trial*, 682. *pl.* 1, 2, 5.

Waste. Nor upon *Null wast fait* can he say, *suffi-
cientment repair devant le brief purchase*. *Ibid.*
pl. 3.

Libel. In an Information for Writing, Printing, and
Publishing a Libel, That Copies were found
in the Defendant's Chamber, is no Publication,
without discoursing it, or Delivery of it out.
Keb. 2 Part 502.

What Evi- The Jury can have nothing but what is de-
dence the livered to them in open Court, and given in
Jury may have Evidence by the Party in Court: If an Exem-
with them. plification come out of *Chancery* of Witnesses
Exemplifica- examined there upon Oath, who are dead, the
tions. Jury shall have this with them; but if the
Exemplification comprehend some Witnesses
alive, and some dead, they shall not have it
with them. Neither shall they have any Pedi-
gree drawn by a Herald at Arms, for it is no
Evidence, only Information for Direction.

Pedigree. Nor an Office before an Escheator, unless
exemplified, nor a Testimonial, nor a Part of
a Fine indented, unless exemplified, but they
may find the same specially.

An old Terrier or Survey of a Manor, whe-
ther Ecclesiastical or Temporal, may be given
in Evidence, for there can be no other way
of ascertaining old Tenures or Boundaries.
Gilb. L. of Evid. 78.

Terror. Conventicle of thirty or forty, is Evidence
of Terror, &c. *Keb.* 2 Part 558.

Matter in Matter in law is not to be given in Evi-
Law. dence, for the Jury are only to try Matters of
Fact.

Fact. The adverse Party may demur to such Evidence. 3 H. 6. 36. Vaughan's Rep. 143.

A Writing or Answer permitted to be read *Totum & pars.* in Part, may be read *in toto*.

The Council of that Party which doth begin to maintain the Issue, whether of Plaintiff or Defendant, ought to conclude.

The Jury may carry from the Bar an Exemplification under the Great Seal, of Depositions in *Chancery*; but if they are not exemplified, the Jury can only look upon them at Bar, but not have them with them out of Court.

Exemplifications of Depositions in Equity shall be delivered to the Jury, if the Party be dead; but if they comprehend the Testimony of some that are living, they shall not be given in Evidence. *Gilb. L. of Evid.* 21.

In Evidence, he which affirms the Matter in Issue, ought first to make the Proof to the Jury. *Litt. R.* 36. *Godb.* 23. 3 *Leon.* 162. Where there are several Issues, if there be one *Affirmative* in any of them from the *Plaintiff*, he shall first go through his Evidence as to *all* of them; but where the *Affirmative* lies upon the *Defendant*, he shall first go through his Evidence. *Vin. Evidence*, 60.

On a *special* Issue no Body can run into any Point that is out of the Issue; but on the General Issue, whatever tends to satisfy the *Plaintiff's* cause of Complaint may be given in Evidence. *Gilb. L. of Evid.* 233, 4.

The King's Message or Letter shall not be allowed for Evidence between Party and Party; otherwise where the Matter was secret, and that the King only had personal Knowledge,

ledge, as in *Sir George Reynel's Case*, Co. 9 Rep.

Mich. 8 Car.
2. B. R. 66.
Smith versus
Rawlins.
2 Keb. 126.
Impropria-
tion. Vicar.

Upon Evidence at Bar it was agreed, That an old Impropriation shall be presumed to be well and lawfully made. A Vicar might anciently have been endowed without a Deed sealed, being only an Ordination of the Bishop, and Allotment of Maintenance.

Hand.

The Chief Justice said, If a Man be over-sea or dead, the Party shall be admitted to prove his Hand by Witnesses, or comparing with other of his Writings; to which the Court agreed.

Marriage.
Starch v. Ely.
24 Car. 2.
Rot. 494.

In an Action brought by a Woman for slandering of her, by which she lost her Marriage with J. S. the Marriage of J. S. is not traversable, but ought to be proved in Evidence.

Foreign At-
tachment.

Custom of foreign Attachment may be pleaded, or given in Evidence. 3 Keb. 221.

Evidence may be given to mitigate Damages, in all Cases where Damages are to be recovered; as in Waste, that the Premises were ruinous at the Time, &c. or burnt by Enemies, &c. See *Olive* and *Gwin's Case*, in *Siderfin* 2 Part 155. in the *Exchequer*, good Matter concerning Evidence, where it was adjudged, that a Record had in *Brecknock* in *Wales*, under the Seal of *Brecknock*, might be given in Evidence. See *Hardr. Rep.* 118.

Refusing to
give Evidence
is a Contempt,
and fineable.

Lord *Preston* was committed by the Court of Quarter-Sessions, for refusing to be sworn to give Evidence to the Grand Jury, on an Indictment of High Treason. He was brought by *Habeas Corpus* in B. R. and *Holt*, C. J. said, it was a great Contempt, and that had he been there, he would have fined him, and committed

ted

ted him till he had paid the Fine; but being otherwise he was bailed. *Rex versus Preston*, *Salk.* 278.

You may take out Execution on a Judgment in Paper signed by the Master, but you cannot give a Copy of it in Evidence till it is brought in Parchment. *Gilb. L. of Evid.* 22.

Gbarndock was indicted, for that he the 10th of February, 9 *W.* 3. & *diversis aliis diebus* & *vicibus tam antea quam postea*, in the Parish of *St. Clement Danes*, did traiterously conspire to kill the King. *Et per Holt*, C. J. Evidence may be given of a treasonable Conspiracy, &c. at any Time before or after the Time alledged in the Indictment:

1st, Because it is only a Circumstance, and of Form, some Day must be alledged, but it is not material.

2dly, The Indictment lays it to be at divers Days and Times, as well before as after, and thereby comprehends what was done last Year, as well as this; and as the Evidence may be of Matters before that Time, so it may be of Matters also at any Time after the Time specified in the Indictment, provided it be not *after the Time the Indictment was found*; neither is the Evidence tied up to the Place; for it may be of any Place, provided it be not out of the County; and so it is of all criminal Cases. *Salk.* 288.

Indictment, That the Defendant, with others, at the Parish of *St. Giles in the Fields*, riotously assembled, & *quoddam cubiculum cujusdam S. S. in Domo Mansionali cujusdam David James fregit* & *intravit*, and thirty Yards of Stuff took and carried away. On Evidence it appeared to be the Mansion-house of *David*

Jamson, and not *James*; and held by *Parker*, C. J. at *Nisi prius*, that this did not maintain the Indictment. 1 *Salk.* 385. *Regina* versus *Cranage*.

Durefs cannot be given in Evidence, but must be pleaded. *Gilb. L. of Evid.* 165, 166.

Person presumed to be living, 'till Proof to the contrary. Unless absent for seven Years.

Generally Persons are presumed to be living, if the contrary be not proved. 2 *Roll. Rep.* 461. *Throgmorton* versus *Walton*.

But by 19 *Car. 2. cap. 6.* If Persons for whose Lives Estates are granted, remain beyond Sea, or absent themselves in this Kingdom seven Years together, and no evident Proof be made of their Lives, in any Action commenced by the Lessors or Reversioners for Recovery of such Tenements, they shall be accounted as dead.

Provided, That if after any Persons shall be evicted by Virtue of this Act, the Persons, upon whose Lives such Estates depend, shall return from beyond Sea, or on Proof in any Action for the same, be made appear to be living, or having been living at the Time of the Eviction; the Tenant, who has ousted, his Executors, &c. may enter, &c. And upon Action against them that received the Profits, recover for Damages the full Profits, with lawful Interest.

Where one in Possession of an Estate shall be concealed from the Reversioner, and not shewn to him once a

Year, such Person shall be taken for dead without other Evidence.

cealed

concealed by the Guardian, Trustee, or other Person, may once a Year, if the Person grieved think fit, move the Lord Chancellor to order such Guardian, or such Person suspected to conceal, to produce to such Person and Persons, suspected to be concealed; and if such Guardian, &c. shall refuse or neglect to produce the Person on whose Life such Estate depends; then the said Court is to order such Guardian, &c. to produce the Person conceal'd, in *Chancery*, or before Commissioners appointed by the Court, (two of which Commissioners to be named by the Prosecutor.) And if such Guardian neglect to produce such Person so concealed, and the Return be filed in the Petition Bag, the Person concealed shall be taken to be dead; and the Person claiming may enter on such Estate.

By 11 *W. & M. Sess. 1. cap. 16.* It was enacted, That after the Death of any Person simoniacally promoted to a Benefice, the Offence or Contract of *Simony* shall neither by Way of Title in Pleading, or in Evidence to a Jury, or otherwise be alledged or pleaded to the Prejudice of any Patron innocent of *Simony*, or of his Clerk, upon Pretence of Lapse, or otherwise, unless the Parson simoniacally promoted, or his Patron were convicted of such Offence at the Common Law, or in some Ecclesiastical Court, in the Life of the Person simoniack.

A Peer produced as a Witness ought to be sworn. 3 *Keb. 631.* Earl of *Shaftsbury* versus *P. Digby.*

The Wife is not obliged to discover the Wife, Husband's Treason.

Wife

Wife de facto only may bring Trespass for an Assault by Husband. On Not guilty in Trespass for an Assault, the Defendant gave in Evidence his Marriage with the Plaintiff; to encounter which, she proved a former Marriage to one *Westbrook*, who was alive at the Time of her second Marriage. For the Defendant it was insisted, the Plaintiff ought not to give Felony in Evidence to support her Action; but this was over-ruled, and she obtained a Verdict, her Marriage with the Defendant being void *ab initio*. T. 4 G. 1. *Westbrook v. Stratville*, before King, C. J. in *Middlesex*, 1 *Stra.* 79.

In an Action for Wages earned by the Plaintiff's Wife of the Defendant's Intestate, the Ch. Justice would not allow the Wife's owning the Receipt of 20*l.* to be given in Evidence against the Husband. 2 *Stra.* 1094.

In Escape
what Evi-
dence.

No Retaking shall be given in Evidence in an Action of Escape, unless specially pleaded, and Oath be made by the Keeper of the Prison, that such Escape was without his Consent; but if such *Affidavit* prove false, such Keeper shall forfeit 500*l.* 8 & 9 *W.* 3. *cap.* 27.

Every Keeper's refusing after one Day's Notice, to shew the Prisoner in Execution to the Creditor or his Attorney, shall be adjudged an Escape. *Ibid.*

A Note from
the Gaoler,
Evidence of
a Person's
being a Pri-
soner.

Persons desiring to charge any Person with an Action or Execution, shall, at their Request, have a Note in Writing from the Keeper of the Prison, whether such Person be a Prisoner, or not, under Forfeiture of 50*l.* And such Note shall be sufficient Evidence. *Ibid.*

Where

Where a Woman conceals the Death of her **Concealment**
Bastard-Child, it shall be look'd upon as mur- **Evidence of**
dered by her, unless she can prove by one Wit. **Murder.**
ness at least, that it was Still-born. 21 *Jac.* 1.

cap. 27.

In an Ejectment brought by the Lessee of **Bastardy ad-**
Pride on a Trial at Bar in the *King's Bench*, be- **mitted to be**
fore *Holt* C. J. and *Eyre* J. The Plaintiff inti- **prov'd after**
tled himself to the Lands in Question, as Heir **the Party's**
to *George*, late Duke of *Albemarle*, by being **Death.**
Son to a Daughter of *Monk*, who was elder
Brother to the Duke. (Supposing the Duke
died without Issue.) The Defendant claimed
under a Deed, and also under a Will of *Christo-*
pher, son to Duke *George*.

To which the Plaintiff replied, he was not
Son to Duke *George*, but a Bastard, because at
the Time Duke *George* married the Mother of
the said *Christopher*, she had a Husband then
living; and so the Marriage was void; and
the Plaintiff produced several Witnesses who
endeavoured to prove this Fact. To this the
Council for the Defendant objected, That
they ought not to be admitted to give Evi-
dence to bastardize a Man that was dead, and
after the Death of his Father and Mother,
who were married in 1653, and cohabited
together as Man and Wife continually, to the
Time of their Death, which was ten Years
after; and Duke *Christopher* was acknowledged
as son and Heir to Duke *George*, unto the
Time of his Death, which was in 1668; and
was called son and Heir in the Settlement and
Will of Duke *George*, and enjoyed the Estate
accordingly; and the Defendant under him,
by Settlement, for above twenty Years: And
Duke

Duke *Christopher* also sat in Parliament as Son and Heir to Duke *George*; and in a Patent made by King *Charles* the Second, was so stiled, and in an Act of Parliament that passed to enable him to dispose of Lands that were settled on him as such; and therefore they insisted that no Evidence should be given to bastardize him: But the Judges were of Opinion, that if the Facts were true, the Marriage was null and void, and the Jury might find the Facts; and this Evidence was admitted. 3 *Lev.* 340. The Rule that one shall not be bastardized after his Death, holds only in the Case of *Bastard eigne* and *Mulier puisne*. *Pride* versus the Earls of *Bath* and *Montague*, *Hill.* 6 *W.* 3. *B. R.* 3 *Lev.* 340. *Salk.* 120.

Deceit of the Factor beyond Sea, Evidence to charge the Merchant in an Action of Deceit.

In an Action on the Case for a Deceit, the Plaintiff set forth, That he bought several Parcels of Silk for——Silk: On Trial, upon Not guilty, it appeared that there was no actual Deceit in the Defendant, who was the Merchant, but that it was in his Factor beyond Sea; and the Doubt was, If this Deceit could charge the Merchant? And *Holt* C. J. was of Opinion, that the Merchant was answerable for the Deceit of his Factor, tho' not *criminaliter*, yet *civiliter*; for seeing some Body must be a Loser by this Deceit, it is more reasonable that he that employs and puts a Trust and Confidence in the Deceiver, should be a Loser than a Stranger; and upon this Opinion the Plaintiff had a Verdict. *Hern* versus *Nichols*, *Salk.* 289.

In an Ejectment upon an Elegit, you must prove not only the Judgment, and by the Judgment-Roll, that the Elegit issued, and was returned, but you must prove the Writ of Elegit by

by a true Copy thereof, and the Inquisition thereon, because the Notice of the Judgment-Roll is no more than that the Party did elect such Execution to issue, and it is the Elegit and Inquisition upon it, that carves out the Term, and gives the Title of Entry, so that the Judgment-Roll is no more than a Memorandum, that it was issued and returned, and the Copy thereof is no Evidence, being but a Copy of that, which is but a Copy or Memorandum of the Thing itself, *sed Quære*; because *Holt* was then of a different Opinion, and was for allowing the Entry of the Roll to be good Evidence that the Elegit had issued; for a Notice on the Roll of the Being and Return of the Elegit, is as good Evidence, that such Elegit was, as a Copy thereof. *Gilb. L. of Evid.* 9, 10.

On general Acts of Parliament the printed Statutes, Statute Book is Evidence; not that the printed Statutes are the perfect and Authentick Copies of the Records themselves, for there is no absolute Assurance of their Exactness, but every Person is supposed to apprehend and know the Law which he is bound to observe, and therefore the printed Statutes are allowed to be Evidence, because they are the Hints to that which are supposed to be lodged in every Man's Mind already. *Ibid.* 10. where Evidence.

A saving Proviso may be given in Evidence on the General Issue, because, if the Party be within the Proviso, he is not guilty on the Body of the Act, on which the Action is founded, and consequently, if the Defendant shew he is within the Proviso, he is Not guilty *contra Formam Statuti.* *Ibid.* 11.

In

In *private* Acts of Parliament the printed Statute Book is not Evidence, though reduced into the same Vol. with the general Statute, but the Party ought to have a Copy compared with the Parliament-Roll; *Quare*, for it seems the better Opinion, that the Copy of private Acts allowed to be Evidence, ought to be under the Great Seal. But Lord Chief Justice *Parker* allowed the printed Statute to be Evidence, in the Case of the College of Physicians and Doctor *West*, of the Truth of a private Act of Parliament, touching the Institutions of the College of Physicians, *London. Gilb. Law of Evid. 12, 13.*

On Not guilty pleaded, the Defendant cannot give Evidence the taking the goods as a Deodand. 1 *Str. 61.*

It was held, that no Release could make the Bankrupt a Witness to prove his own Act of Bankruptcy. *H. 2 Geo. 2. Field versus Curtis, 2 Str. 829.*

What a Man himself that is living has sworn at one Trial, can never be given in Evidence at another Trial to support him; tho' what the Witness has said in Discourse may be given in Evidence to support him; because the same Oath at another Trial is no Evidence of the Truth of any Man's swearing; for if a Man be of that ill Mind to swear falsely at one Trial, he may do the same on the other, on the same Inducements; but what a Man says in Discourse, without Premeditation or Expectation of the Cause in Question, is good Evidence to support him. But if a Man hath sworn at one Trial different from what he hath at another, this is good Evidence as to his Discredit. *Gilb. Law of Evid. 69, 70.*

Comparison

Comparison of Hands is Evidence in *civil* but not in *criminal* Cases; for the Comparison of Hands is no more than a Presumption, founded on the Likeness, and the Presumption is in Favour of the Defendant, that he is Not guilty, so there is no more than one Presumption against another. *Gilb. Law of Evid.* 54, 55.

On Oath that a Witness is dead, or unable to travel, or detained by Means of the Prisoner, or cannot be found, his Examination before the Coroner is good Evidence; but the Coroner must swear the Examinations are the same which were taken before him on Oath. *Gilb. Law of Evid.* 140, 141.

If a Man was blind, and the Deed mis-read to him, he may plead *non est Factum*, and such Evidence will maintain the issue, for then 'tis indeed none of his Contract. *Gilb. L. of Evid.* 164.

On Question on a Trial, whether the Property of a Parcel of Wine, was in the Defendant, in order to ascertain whether Alien or British Custom was due for them, a Paper under his Hand, being an Affidavit he had been at the Custom-house, was given in Evidence, he swearing in it that the Wine was his. *E. 4 G. 1. B. R. Vin. Abr. Tit. Evid.* 83. *pl.* 4.

The Plaintiff or Defendant may make an Affidavit in their own Cause depending here, and it may be filed; but it may not be admitted in Evidence in the Trial of the Cause betwixt them. *Ibid.* *pl.* 2.

A Man being about to convey Lands to a Purchaser, made Oath before a Master in Chancery, that there was no Incumbrance on the Estate; in an Ejectment brought, this Affidavit was produced in Court, but not suffered

to be read but as a Note or Letter, unless the Plaintiff would produce a Witness to swear that he was present when the Oath was taken before the Master. *Ibid. pl. 1. cites 3 Mod. 36. M. 35 Car. 2. B. R. Smith versus Goodier.*

Though an Affidavit cannot be read in Evidence, yet if the Party who made the Affidavit be sworn, and gives Evidence, his own Affidavit may be read against him; and this is allowable, to shew in what Manner he contradicts himself. *M. 5 W. & M. in B. R. The Queen versus Rachel Taylor, Skin. 403.*

Affidavit by a Plaintiff in *Holland*, attested by a Publick Notary, shall be admitted a good Evidence to hold Defendant to special Bail here. *Vin. Abr. Tit. Evid. 87. pl. 8. cites 8 Mod. 322.*

Of Evidence by Witnesses.

It is a good Challenge to the Witness to say, that he *was one of the Accusers quod Nota.* *Vin. Abr. Tit. Evid. 1.*

Oftentimes a Man may be challenged to be of a Jury, that cannot be challenged to be a Witness; and therefore though the Witness be of *nearest Alliance, or Kindred, or of Council, or Tenant, or Servant*, to either Party, (or any other Exception, that maketh him not infamous) or to want *Understanding, or Discretion, or a Party in Interest*, though it be proved true, shall not exclude the Witness to be sworn, but he shall be sworn, and his Credit upon the Exceptions taken against him left to those of the Jury, who are Tryers of the Fact; insomuch as some Books have said, that tho' the Witness to the Deed be named a Disseisor in the Writ,

Writ, yet he shall be sworn as Witness to the Deed. *Vin. Abr. Tit. Evid. 1. cites Co. Lit. 6. b.*

If a Person be infamous, he shall not be sworn as a Witness. *1 Inst. 6. b.*

Men that are so branded with infamy, that they cannot be Jurors, (for which see before *who may be Jurors*) cannot be Witnesses; yet *per Glyn* Chief Justice, and *Nudigate* Justice, *Mich. 1657. B. R.* Conviction of common Barretry hinders not from being a Witness; but *Maynard*, Serjeant, held strongly against it. *V. 2 Salk. 690.*

At Lent Assizes, *Suffolk, 1657. St. John* Chief Justice *C. B.* would not allow one who had been whipped for Petty Larceny to be a Witness; but *Earl* Serjeant said, they ought to be *stigmatici* that are disabled from being Witnesses: Yet *per Rolle* Chief Justice, one burnt in the Hand for Felony may be a Witness; for he is in Capacity to purchase Lands, and his Fault is purged by his Punishment. *Style 388.*

A bare Conviction of Perjury will take away a Person's Evidence, because it is an infamous Crime; but *contra*, where, tho' the Punishment is the Pillory, the Crime is not infamous. *2 Salk. 514. See Co. Lit. 6. b.*

A Pardon of Felony restores a Party to his Credit, and he may be a Witness. (*a.*) *Goldb. 288. 1 Vent. 349.*

The

(*a*) Where the *Disability* is only the *Consequence* of the Judgment, the King may pardon it; but where the *Disability* is *part of the Judgment* itself, the King's Pardon will not take it away; therefore, if a Man be convicted of *Perjury* on the Statute, the King's Pardon will not re-

The general Rule is, that the Husband cannot be a Witness *for or against* the Wife, nor the Wife *for or against* the Husband, being adjudged that the Husband cannot be a Witness against the Wife, nor the Wife against the Husband, to prove the first Marriage, on an Indictment on the Statute 1 Jac. 1. c. 11. for a second Marriage; but the *second* Husband or Wife may be allowed to give Evidence, such second Marriage being void, therefore they were never Husband and Wife. 2 Bac. Abr. 286.

But some Exceptions have been allowed to this general Rule, especially in Cases of evident Necessity; and therefore it hath been adjudged, and is the constant Practice at this Day, that on an Indictment for a forcible Marriage, grounded on 3 H. 7. the Wife may be a Witness against the Husband; so where Husband or Wife have cause to demand Sureties of the Peace against each other. 2 Bac. Abr. 286.

Also in Lord Audley's Case, who held his Wife's Hands and Legs while his Servant, by his Command, ravished her; the Wife was admitted an Evidence. Hutt. 116. 2 Hawk. P. C. 432. But in Raym. 1. this Case is denied to be Law; and in Vent. 244. it is doubted

fore; for it is not a Consequence, but Part of the Judgment, viz. *Quod impossum non sit receptus ut Testis*, cites Co. Ent. 368. But a Pardon by Act of Parliament will restore him in that Case; per Holt Ch. J. 2 Salk. 689. pl. 1. E. 7 W. 3. B. R. in Case of King and Crosby, *ibid.* says *Quod Nota. Quære* of a Perjury at Common Law, and if the Law be the same; for there the *Disability* is only a Consequence, and not Part of the Judgment; otherwise, if a Jury be convicted on an Attaint, and cites *Rast.* 56. a.

of by my Lord Chief Justice *Hale*, because here is a Wife *de jure*, and so not like the Case, where a Woman is admitted to prove a forcible Marriage.

Also in *Raym.* 1. it is said, that a Husband and Wife may be Witnesses against one another in Treason; but the contrary is adjudged in 1 *Brownl.* 47. and with this last Book, 2 *Hawk. P. C.* 432. seems to agree.

In a *qui tam* on the Statute of Usury, the Chief Justice refused to let the Party to the Contract be a Witness to prove the Repayment of the Money, because till that was proved, he was no Witness at all. *T. 11 G. 1. Shank qui tam v. Payne*, 1 *Str.* 633.

On Indictment against the Husband for an Assault upon the Wife, the Chief Justice allowed her to be a good Witness for the King, and cited Lord *Audley's Case*, *State Trial*, Vol. I. *T. 11 G. 1. The King versus Azire*. 1 *Str.* 633.

Two were indicted for an Assault, one submitted, and was fined 1s. and paid it, the other pleaded Not guilty, and, upon the Trial, the Chief Justice allowed him to call the other Defendant, the Matter being now at an End as to him. *T. 11 G. 1. The King v. Fletcher*, *Str.* 633.

In an Indictment prosecuted by the Husband, for seducing away his Wife, and keeping her some Time in Adultery. The Wife was admitted to be a Witness against the Defendant, *Coram Judice Windham*, Lent Assizes at *Alebury*, and the Defendant was found guilty. She may be a Witness to prove a Cheat upon her and her Husband. *Sid.* 431.

And so it was resolved in *John Brown's Case*, *Trin.* 25 *Car.* 2. *B. R.* on the Statute of 3 *H.* 7. *cap.* 2. *vid.* 1 *Cro.* 492.

The Wife of a Bankrupt cannot be examined by the Commissioners under the Statute of Bankrupts. 1 *Brownl.* 47.

There was a Libel in the Spiritual Court, *causa jactitationis maritagii*, pending which, the Witnesses who were to prove the Marriage were indicted for a Conspiracy to carry the Woman away by Force, and marry her; and she was allowed a good Witness. 4 *Mod.* 8. *Rex versus Fegas.*

Roll. Trial,
686. H.

The King cannot be a Witness by his Letters under his Signet Manual: One attainted of Piracy cannot be a Witness to prove another guilty. If he accused another before he was attainted, and afterwards confesses he wronged him, this Confession shall be rejected, because he is attainted. A Woman cannot be a Witness to prove a Man to be a Villein. *Co. Lit.* 6. 8.

Roll. Trial,
685. pl. 2.

But an Attorney cannot be a Witness against his Client for Matters subsequent to his being employed.

Neither can the Party to the usurious Contract be a Witness against the Usurer, in an Information upon the Statute of Usury. But Kinsmen never so near, Tenants, Servants, Masters, Councillors, and Attornies, &c. may be Witnesses. A Councillor may be a Witness to the Agreement, &c. but not to the Validity of an Assurance, nor to the Council he gave. *March Rep.* 43. If a Witness being served with Process, and having Money sufficient to bear his Charges, (or less, if he accept it) do not appear to give his Testimony, he forfeits 10 *l.* to the Party damnified, and must recompence his Damages, 5 *Eliz.* 9. If a Witness commit wilful Perjury, he loseth 20 *l.* shall be imprisoned

soned six Months, without Bail, stand in the Pillory, and be disabled to be a Witness; so shall the Suborner who procures the Perjury. 5 Eliz. 9.

In an Indictment for Usury, the Case was, The Defendant lent the Prosecutor 45 *l.* on a Pawn of Jewels, for a Year, at 9 *l.* Interest; and afterwards the Prosecutor gave the Defendant a Bond for the same Money. *Holt*, C. J. admitted the Prosecutor to be an Evidence, *de bene esse*, to prove the Contract; it being a Question whether the new Bond were void or not? *Farest.* 118. *Rex versus Sewell.*

A Party robbed is allowed a good Witness in his own Action against the Hundred, for he is not bound, nay he is to be blamed, to tell any one what Charge he carries with him; and if he should not testify, the Law would be often fruitless for Want of Evidence, or else more Robberies committed by the Party's discovering his Money.

An Approver, or an Accomplice, may be a Witness till he is indicted. *Vin. Abr. Tit. Evid.* 1. *pl.* 7.

A. and *B.* jointly committed in Execution to the Fleet, at the Suit of the Crown; in an Action against the Warden for suffering *A.* to escape, *B.* was held a good Witness to prove it. *Fitzgib.* 80.

4 & 5 Ann. 16. All Witnesses who ought to be allowed good Witnesses upon Trials at Law, shall be deemed good Witnesses to prove any Nuncupative Will.

Case against Defendant for rescuing a Person arrested on mean Process, the Party rescued was allowed to be a Witness for the Defendant.

Per Holt C. J. sed hesitater, and his Credit left to the Jury. 6 *Mod.* 211. 2 *Salk.* 690.

Defendant was convicted of Deer-Stealing on the Oath of the Informer, who by *Star. 13 Car. 2.* is to have a Moiety of the Forfeiture, being 20*l.* It was moved to quash the Conviction, the Informer not being a good Witness. The Court gave no Opinion, but it seems he is no Witness.

In the Case of *Brereton and Tatam, Mich. 1656. B. R. Glyn* Chief Justice cited the Lord *Chandos's* Case in this Court, where one *Gates* an Executor was produced to prove the Will, as a Witness, to which he (as Council) excepted, because of his Executorship. It was answered, that he had fully administred: He replied, that Assets might afterwards come to his Hand; but the Court resolved, that it would not be presumed to bar his Testimony, which was allowed in the principal Case, being in Ejectment.

Assumpsit for the Profits of the Office of Chancellor to the Bishop of *Landaff*: A former Bishop had granted it to one *Dr. Loyd* and the Plaintiff, and the Survivor of them, and *Dr. Loyd* was dead; the present Bishop had granted it to the Defendant; and the Question was, whether there was any Usage to grant this Office to two; and the Bishop was produced to prove no such Usage; and held no Witness. 4 *Mod.* 16.

It is no good Exception to a Witness, that he hath Common *per Cause* of *Vicinage* in the Lands in Question, because it is but an Excuse of Trespas, and no Interest. *Clapham's Case, Mich. 1657. B. R.*

The same of Common of *Shack*.

A Feoffment

A Feoffment in Fee was made to the Use of J. S. and two Witnesses subscribed as to the Execution of it by Livery and Seisin; afterwards one of the Witnesses had an Estate at Will in Part of these Lands, and being produced to prove the Livery and Seisin, at a Trial at Bar, it was objected to him that now he was a Party interested in the Land; but held a good Witness. 1 *Bulstr.* 202.

If the Obligee devises the Debt to the Obligor, and his Executors deliver up the Bond in Satisfaction of the Legacy, which is cancelled, and after the Validity of the Will is questioned, viz. whether the Testator was *compos*, &c. the Obligor is a good Witness for the Will, because by the cancelling of the Bond his Debt was discharged. But *contra* in case of Mortgage, for though the Deed be cancelled, if it be no good Will, he must pay the Money. *Goodman versus Turbervil*, Mich. 1657, B. R.

If A. gives a Bond to B. conditioned to pay all the Money due from C. to B. C. is a good Witness to prove what is due. *Lutw.* 663.

An Action was brought by the Corporation of the Weavers of *Norwich*, for a Penalty against a Weaver for working at his Trade in Harvest-time, contrary to an Ordinance by them made. And *Atkins* Justice, allowed one of the Corporation to be a Witness, though one Moiety of the Penalty was due to the Corporation. *Lent Affize* 1657.

In a Trial at Bar, where an Estate for Life is limited to J. S. Remainder to the Poor of the Parish of *Greenwich* by Will; the Inhabitants of *Greenwich* were allowed to be Witnesses to prove the Will. *Townsend and Roan*, Mich. 1658. B. R. *Siderfin*, 2 Part 109.

A special Issue was directed to try, whether any Custom in a Manor for Fines, to be paid by Tenants on the Death of a Lord, to the Heir during his Minority. The Steward was produced to prove such Custom; and it was objected, that he had a Fee on every Admission; but *non allocatur*, and he was sworn. 3 Keble 90.

An Action of Debt was brought, *Summer Assizes, Suff. 1669.* by the Town of *Ipswich*, for 50*l.* a Fine set upon one chosen Common Council Man (called their prime Constable) for refusing to renounce the Covenant, &c. And the Town-Clerk (though a Freeman) was allowed a Witness to prove Election, Refusal, &c. and the Fine set, which is for Necessity, for that none other are or ought to be present at those Acts. *Rainsford Justice.*

Per Hale Chief Justice, *Norfolk Summer Assizes, 1668.* A Freeman of *Lyn* is not an allowable Witness to prove the Custom of Foreign bought and foreign sold in that Town. *Harwich versus Twels.*

All Persons may be Witnesses who appear to have sufficient (a) Discretion, and who from their (b) Principles, must be presumed to have a right

(a) An Infant of the Age of Nine Years has been allowed to give Evidence, *H. P. C. 263.* See 1 *Str.* 700.

(b) But an Infidel cannot be a Witness, *i. e.* such a one as neither believes the *Old* or *New Testament* to be the Word of God, or one to which our Laws require the Oath should be administered. 2 *Keble* 314. 2 *Hawk. P. C.* 434. The Answer of an Infidel taken by Commission at *Calcutta*, in *Bengal*, in the *East Indies*, after the Manner of that Part of the World, was allowed good Evidence by the late Lord Chancellor *Hardwicke*, after hearing the Arguments of Lord Chief Justice *Lee*, Lord Chief

a right Sense of the Sanctity of an Oath, and of the Obligations it lays them under to depose the whole Truth; therefore Infants, Aliens, Villains, Bond-Men, &c. May be Witnesses. 2 *Bac. Abr.* 285. cites *Co. Lit.* 6.

Note; No Man can be a Witness for himself, but he is the best Witness that can be against himself. *Gilb. L. of Evid.* 122.

Informer no Witness, where intitled to Part of the Penalty. 1 *Str.* 316.

Vendor, a good Witness as to Title, where no Covenant for Warranty, &c. 1 *Str.* 445.

Wife (a) of *Prochein Amy* allowed to be a good Witness in an Action by the Infant. *H.* 8 G. 1. *Dennison* versus *Spurling*. In *Middlesex*, before *Pratt* Chief Justice. 1 *Str.* 506. But Defendant's Guardian upon Record not. Same *T. Clutterbuck* and *Lord Huntingtower*. *Ibid.*

An Infant brought an Action of Assault, and declared by Guardian. And to prove that this Witness was the Promoter of the Cause, and at the Expence of it, the Chief Justice allowed the Defendant to give the Guardian's Declaration to that Purpose in Evidence, he being a Person liable to Costs. *Hil.* 9 G. 1. *James* versus *Hatfield* at *Guildhall*, before *King* Chief Justice, 1 *Str.* 548.

Chief Justice *Willes*, and Lord Chief Baron *Parker* at *Lincoln's Inn Hall*, 23 *Keb.* 1744. *Hil. Term* 18 G. 2. but his Lordship declared, it was permitted to be read on Account of the especial Circumstances of that particular Case, and that he carried it no further. *Omichund* and *Barker*, 2 *Eq. Abr.* 397. pl. 15.

(a) But *Prochein Amy* no Witness, he being liable to Costs. 2 *Str.* 1026.

A Corporator

A Corporator who has acted under the right claimed, may be a Witness to prove the Usage.

2 Str. 1069.

The Wife of one Defendant cannot be a Witness for the other, on an Indictment against two, 2 Str. 1095.

As to the Witnesses Privileges.

One was subpoena'd *ad testificandum*, and prayed a Privilege from being arrested, which was granted; and *per Cur.* It will supersede an Arrest upon mean Process, but not upon an Execution; yet the Sheriff in that Case may be committed for his Contempt. *Hen. Nevil's Case, Mich. 15 Car. 2. B. R.*

Detaining of Witnesses :

Sir *Jo. Jackson* was convicted upon an Information for preventing of Evidence to be given on an Indictment of Perjury against *Fenwick* and *Holt*, who had been Witnesses for Sir *J. J.* he arrested some Witnesses, and gave Money to others, and so they were acquitted: He was fined one thousand Marks, one Month's Imprisonment, Behaviour for twelve Months. *Hill. 1663. B. R.*

Such Persons as are infamous, as are Persons attainted of Felony, or of a false Verdict, or of a Conspiracy, or of Perjury, or of Forgery, upon the Statute of 15 *Eliz. cap. 14.* and not upon the Statute of 1 *H. 5. 3.* and such as have had Judgment to lose their Ears, or stand on the Pillory or Tumbrel, or have been stigmatized or branded, and Infidels, Men not of sound Memory, or not of Discretion, or such as are interested in the Cause, or have Benefit, are not competent Witnesses. *Co. 1*

Inst. 6. but we see Jews are daily admitted Witnesses.

By Order of Court, the Depositions taken of a sick Witness may be taken in Evidence.

'Tis dangerous to permit Evidence to a Ju- Deed.

ry by Witnesses, that there was such a Deed, which they have seen or read, or prove the Deed by a Copy, because the Deed may be upon Condition, Limitation, or Power of Revocation; and if this should be permitted, the whole Reason of the Common Law, in shewing Deeds to the Court, would be subverted; for the Deed might be imperfect and void, which the Witnesses could not perceive; yet in Cases of Extremity, as where the Deed was burned, or lost by some other notorious Accident, the Judges may at their Discretion allow them to be proved by Witnesses. *Lib.* 10. 92. and so of a Record.

Keb. 2 Part, 546. Instances of a Copy not examined, allowed and disallowed in Evidence; but I think unless the Witness swear that he remembers the Contents of the Deed, and that they are as the Copy is,

the Copy ought not to be allowed Evidence, unless examined.

If a Man makes a Feoffment, and afterwards makes another, with Covenants that he was seized, &c. and afterwards an Issue is taken upon the first Feoffment, the Feoffee shall not be a Witness. *Roll. Trial*, 685. *pl.* 1.

Who may be Witnesses. Not Persons interested either in Law or Equity, *in præfenti* or *futuro*.

In an Information for Usury, the Party shall not be a Witness, because he would thereby avoid his own Bonds, &c. and be *testis in propria causa*.

Usury. *Rolls, Trial*, 685. *pl.* 2. 1 *Inst.* 6. b.

In Case of Forgery, Perjury and Usury, the Party grieved may have Advantage by the Verdict, and therefore shall not be received as a Witness; but in Case of an Indictment for Battery, he that was beaten may be Witness, because

cause he can reap no Benefit by the Verdict in another Suit. *Hardres Rep.* 331.

Perjury.
2 Rolls 685.
pl. 3.

Three Men swear an Arbitrament in three several Actions against them, upon the Statute 5 *Eliz.* of Perjury, each of them may be a Witness for the other; but in an Indictment of Perjury upon 5 *Eliz.* the Party grieved shall not be a Witness, for he is to have 20 *l.*

Common Experience tells us, upon an Indictment for Battery, &c. the Party grieved may be a Witness, because 'tis only for the King. *Ibid.* pl. 5.

Hundred.
Roll. Trial,
685. pl. 6.

In an Action against the Hundred upon the Statute of *Winton*, &c. the Lessor living out of the Hundred may be a Witness; for 'tis not Reason that he and his Lessee being an Inhabitant should be both charged: If the Servant be robbed of the Master's Money, the Master may be a Witness to prove the Delivery of the Money to the Servant before the Robbery. *Roll. Tit. Trial*, 686. *Style* 233.

Juror.

A Juror who is a Witness, must be also sworn in open Court to give Evidence, if he be called for a Witness; for the Court and Council are to hear the Evidence as well as the Jury.

Bail.

If a Witness be Bail, upon Motion the Court will give Leave to alter the Bail. *Style* 385.

Wife.
Charges.

Debt on 5 *Eliz.* 9. Because the Wife did not appear, whereas he *subpæna'd* her, and tendered to her her Charges, and though not laid what Damages, yet being for the 10 *l.* upon the Statute, not for his Damages for her not appearing, and a Feme Covert being within the Statute, 'twas held good enough. 3 *Cro.* 130. *Leon.* 122. Note; She being the Person who was

was to appear, the Charges are to be tendred to her or her Husband.

Debt for 10*l.* against a Witness, upon the Charges. Statute 5 *Eliz.* doth not lie, unless the Witness hath his Charges, and he is not bound to come without his Charges first paid: But if he accept of 12*d.* and a Promise for the rest at the Trial, he is bound, and an Action lieth against him, if he doth not come. *Cro.* 1 Part 522, 540. *Goodwin* against *West*.

A Copy of his Retainer by a Nobleman, Chaplain. entred in the Court of Faculties, denied to be given in Evidence. *Littleton, Rep.* 1. But one that had seen it under the Hand and Seal of the Nobleman, was allowed a good Witness, because the Plaintiff was a Stranger, *Quare Impedit.* &c.

A Councilor may be examined as a Witness Councillor. against his Client, so far as it is of his own Knowledge, not what his Client reveals to him, but what he knows only by his Client's Information.

Mr. *Aylet* having been Council for the Defendant, desired to be excused to be sworn on the general Oath, as Witness for the Plaintiff, to give the whole Truth in Evidence, which the Court after some Dispute granted, and that he should only reveal such Things as he either knew before he was of Counsel, or that came to his Knowledge since by other Persons; and the Particulars to which he was to be sworn were particularly proposed, *viz.* What he knew touching a Will in Question, and the Court only put the Question, whether he knew of his own Knowledge, &c. Councillor. *Spark* against *Middleton*, *Keb.* 1 Part 505.

Tenant

Tenant at Will.

Tenant at Will of Part of the Lands was admitted to prove Livery of Seisin, and the Execution of a Feoffment under which he held. *Bulst.* 1 Part 202.

Attainted of Felony.

If one be attainted of Felony and pardoned, he shall not afterwards be sworn of a Jury, for *Pœna mori potest, culpa perennis erit*; and therefore is not fit to serve on the Inquest, nor yet to be an indifferent Witness; and two such persons proving a Suggestion were rejected, and the Prohibition disallowed. *Brown* against *Crashaw*, *Bulstr.* 2 Part 154.

Trespas against several; after Issue joined on Motion, one of the Defendants Name was struck out, that he might be a Witness for the Plaintiff. 2 *Siderf.* 441. and the like done as to a Person named in the *Simul cum.* 1 *Mod.* 11.

Simul cum.

In Trespas with a *Simul cum*, if nothing be proved against them in the *Simul cum*, they may be examined as a Witness. *Style's Rep.* 401.

Poor's concerns.

Neither he that pays or takes Collection, can be a Witness in such Cases.

Witnesses.

Cestui que Trust is not to be admitted a Witness where the Title of the Land comes in Question.

Trust.

One who would have any collateral Title to the Land, as if he hath a good Deed by the Ancestor, which would charge the Lands in the Hands of the Heir, is not to be admitted an Evidence.

But one who has an equitable collateral Title upon the Land is admissible to be a Witness.

Ch. 15. *Of Evidence by Witnesses.*

387

Indictment of Perjury doth not disable a Witness; otherwise of a Conviction, whether it be by Common Law or Statute. Pasc. 20 Car. 2. Colt. vers. Colt. Perjury.

A Trustee cannot be a Witness concerning the Title of the same Land, the Interest in the Law being lodg'd in him. Trustee.

By *Twisden* and *Wyndham*, if an Action be brought against two, and no Evidence is given against one, he may be a Witness himself in the Case. Mic. 19 Car. 2 B. R. 67. Witness.

In Debt against the Heir upon an Obligation made by his Ancestor and *J. S.* jointly and severally, *J. S.* was sworn a Witness for the Plaintiff. Joint Obligation.

In Trespass against *A. simul cum B. & C.* *B. & C.* are admittable to be Witnesses, if the Plaintiff hath not arrested them, or at the least demanded Process of the Sheriff to do it. Hill. 1651. Coram Roll. Trespass. Simul cum.

A Clerk attending upon a Grand Jury shall not be compelled to be a Witness to reveal that which was given them in Evidence. Trin. 1650. Grand Jury.

Plaintiff recovers against the Defendant upon Perjury, the sole Evidence of *J. S.* and has Judgment, and afterwards *J. S.* was convicted of Perjury upon the same Evidence; notwithstanding the Court would not set aside the Judgment. But if it had been after Verdict that an Indictment of Perjury was depending against *J. S.* the Court would have stopped entering the Judgment 'till the Perjury tried.

It was doubted by *Twisden*, that if one upon Evidence forswear himself, and afterward the principal Action is annulled by Writ of Error, if afterwards he is indictable for this. Mic. 22 Car. 2. B. R. Roy vers. Serjeant.

By

Felony.

By *Rolle*, If one Convict of Felony be pardoned, or is burnt in the Hand, he may be a Witness again.

After Conviction and Clergy allowed, one is capable to be a Witness; *per Cur.*

24 Car. 1.
Radford's
Case.

Radford brings an Action of Debt upon the Statute of 5 *Eliz. cap. 9.* for 10 *l.* against *J. S.* and declares that he was warned by *Subpæna* to appear such a Day at one of the Clock in the Afternoon to be a Witness, &c. And upon *Nil debet* pleaded, the *Subpæna* given in Evidence was generally to appear at this Day, and not at such an Hour; and although a *Subpæna* to appear at such a Day be of that Effect, that the Party ought to attend the whole Day, and so, as it was objected, includes that he ought to appear at this Hour; yet in Respect of the Variance it cannot be said to be the *Subpæna* on which the Plaintiff did declare, and therefore he was nonsuited; and in this Case no Regard was had to the Ticket left with the Defendant, which was according to the Declaration.

Subpæna.

Guardian.

Guardian in Socage shall be admitted to be a Witness for the Infant, for he is accountable.

Trustee.

A Trustee may be a Witness *against* his Trust, by *Hale* Chief Justice; but *Twisden* doubted thereof.

A Trustee may be a Witness if he *Releases*, but *not* if he hath conveyed it over, not even for the King. *Vin. Evidence*, 6.

In a Trial at Bar to avoid a Patent, the Deputy of the Party that would avoid it was admitted a Witness, because the Suit was between the King and Patentee *Ibm.*

An

An Heir apparent may be a Witness concerning the Title of Land; but a Remainder Man cannot. *Per Treby*, Chief Justice. 1 *Salk.* 283.

At a Trial at Bar concerning the Boundaries of Lands lying in two Parishes, the Parson of one of the Parishes was refused to be a Witness, because he might enlarge his own Tithes. *Farely* 63.

Case against a Stake-holder of a Wager; and held, that a Person who had laid a Wager that the Plaintiff did not win, and been paid it, was a good Witness to prove that the Plaintiff had not won. 3 *Lev.* 152.

Case in a feigned issue out of the Chancery, *Cuts versus Pickering*, to try the Forgery of a Will of Sir — *Cuts*, *B. R.* whereby he gave to his Cousin *Dorothy*, now *Pasc. 24 Car.* *Pickering's* Wife, such Lands for 99 Years, *2.* wherein it was said, *That if she so long live* 1 *Vent.* 197. was raised out, and so made absolute for so many Years. And one Mr. *Baker* was called a Witness for the Plaintiff, who desired the Solicitor. Direction of the Court, whether he should be sworn, because he was Solicitor in the Case for the Defendant. The Court said, That about Matters before he was employed he is to be sworn; but we will not examine him about any Privacies, in what he is employed since that Time; and Mr. Attorney General said, he demurred in Chancery for the same Cause, and was over-ruled to be examined. And it was held, a Man cannot give in Evidence an *Hear-Hearfay*. *Hearfay*. *(a)* though the Man be dead; but a Man

(a) Meer *Hearfay* is no direct Evidence, *Gilb. Law of Evid.* 152. But may corroborate the Testimony of a Witness, 153.

may give in Evidence an Hearsay of an Act at the present Time, thereby to fortify and corroborate what the other says.

Pasc. 13 Car.
2. B. R.
Truel *vers.*
Castel.
Coparcener.

One Coparcener not to be Evidence for another in Ejectment, because she claims by the same Title, though not Party to the Suit. But the Daughter of her Sister may be sworn, for although she should be Heir, yet her Mother may give the Lands to whom she will, being Fee-simple.

King.

Witnesses must now be sworn against the King in all Criminal Causes.

Will.

A Legatee or Devisee of an Annuity may be an Evidence to prove the Will, if he hath received it, or released it; and this though after the Action commenced. *Siderf. Rep.* 315.

Equitable
Interest.

An Interest in Equity disables a Man to be a Witness. 2 *Keb.* 345.

It was held on Debate in Chancery, That a Legatee named in a Will, may be an Evidence against the Will; for he swears against his Interest. 2 *Salk.* 291.

A Legatee whose Legacy was paid, and who had given no Security to refund, in Case the Assets were deficient, admitted a Witness in a Suit against the Executor. 1 *Keb.* 651.

The Mother of the Lessor of the Plaintiff, who had made a Bargain with the Lessor of the Plaintiff, to have a Third of the Estate, was refused to be a Witness. 3 *Mod.* 84.

In a Trial at Bar on a *Scire facias* to repeal a Patent, a Witness was allowed to be sworn, to whom the Person that would avoid the Patent, had promised to name him Deputy; by three Judges *contra Twisden.* 1 *Mod.* 211.

After

After four Months that a Dividend is made, a Creditor is a good Witness; for no other Dividend shall be intended. 3 *Keb.* 348. *Bents* and *Mico*.

If a Witness be convicted of Felony, and afterwards pardoned, whether he shall be thereby restored to be a good Witness? And *Scroggs* Chief Justice, and *Raymond* Justice, were of Opinion that he could not, because the Pardon doth take away the Punishment due to the Offence, but cannot restore the Person to his Reputation, and of that Opinion was Justice *Nichols*, *Moor* 872. in *Cuddington* and *Wilkins's* Case: But Justice *Jones* and Justice *Dolbin*, *cont.* And afterwards *Raymond* was of their Opinion: For in *Hobart's* Reports of *Cuddington* and *Wilkins's* Case, it is said, That the Pardon takes away not only *pœnam* but *reatum*. Another Query was, Whether a Man convicted and burnt in the Hand be stigmatized as to his Testimony? And *Jones* Justice held he is not, because the Burning in the Hand is no Part of his Judgment; and is by 4 *H.* 7. *cap.* 13. only to notify to the Judge, that he hath had his Clergy before. 5 *Co.* 50. *a.* *Biggins's* Case. But having examined the Case, do find no Judgment given therein, but compounded, as it is reported both 3 *Cro.* 682. and by *Moor* 571. And *Cro.* says there were two Judges against two. And *Moor* says, it was agreed, the King could not pardon the Burning in the Hand in an Appeal; and in Truth, it seems to be Part of the Judgment, for the Entry is, *Ideo consideratum est quod le Offender cauterizetur in manu sua leva.* *Rast. Entries* 1. *b.* 56. *a.* But upon the whole Matter it appears by *Heston's* Case, cited in

Foxley's Case, 5 Co. 110. That the Burning in the Hand is (by Virtue of 18 Eliz. cap. 6. which saith the Prisoner shall be forthwith enlarged) in the Nature of a Pardon.

Trin. 32
Car. 2. B. R.
en Count de
Castlemain's
Case for in-
tending to
kill the King.
Raymond
379.
1 Vent. 349.

Dangerfield was produced as a Witness, who had been found guilty of several Indictments of Felony for which he had his Clergy, and was burnt in the Hand. And upon other Indictments he had been on the Pillory for Cheating, but had obtained his Pardon under the Great Seal for all his said Offences. A Question did arise, whether he might be a Witness? and thereupon the Prisoner did desire to have Counsel assigned him; and it was granted. And *Darnel* one of his Counsel urged, That *Dangerfield* ought not to be a Witness, for he was blemished, and the Pardon had not restored him, and cited 2 *Brownl.* 7. where it is said, That if the King pardoned a Man attainted for giving a false Verdict, yet he shall not be at another Time impanelled upon a Jury; for though the Punishment were pardoned, yet the Guilt remains. 2 *Bulstr.* 154. *Brown* versus *Crashaw*. In a Prohibition, the Suggestion was proved only by two Persons attainted of Felony. And *Coke* Chief Justice cited *Hill.* 11 H. 4. 41. b. pl. 7. That if a Man be attainted of Felony and pardoned, he shall not after be sworn upon a Jury, because he is not *probus & legalis homo*. But the Court willing to be thoroughly satisfied, sent Justice *Raymond* to the Court of Common Pleas, to know their Opinion in this Point; and the Judges there resolved, That the Burning in the Hand was *quasi* a Statute-Pardon to Felony, and as to that he was a good Witness, and the King's Pardon made him a good Witness as to the other

Clergy.

Pardon.

other Offences; but they said, had he not been burnt in the Hand, the Pardon would not have restored him to his Credit again, because in his Testimony the People are concerned, and consequently the Pardon will not deprive them of their Interest. And thereupon the Judges here allowed him to be a good Witness; and with the Opinion of the Judges of the Common Pleas, as to the Burning of the Hand, agree the Books of 5 Co. 110. a. *Heston's Case*. *Hob.* 292. and *Hob.* in *Cuddington* versus *Wilkins*. But *Moor* 872. says, Justice *Nichols* was of Opinion, that if the Plaintiff had been convicted, the Judgment would have been otherwise. But *Castlemain* was found Not guilty on the whole Matter.

In an Action against the Hundred on the Statute of *Hue and Cry*; it was held, That one that has Lands in the Hundred, but lets them out, and doth not inhabit, may be a Witness for the Hundred; but one that inhabits, tho' he pays no Taxes, is no Witness; for he is compellable to Watch and Ward. 1 *Siderf.* 2.

Upon the Statute of *Hue and Cry*, at a Trial Robbery. some House-keepers appeared as Witnesses, that lived within the Hundred, who being examined said they were poor and paid no Taxes or Parish Duties. And the Query was, whether they were good Witnesses? *Twisden* went down from the Bench to the Judges of the Common Pleas for their Opinions, who said, Judge *Wylde* was confident that they ought not to be sworn, but Judge *Tyrrel* doubted; but after was of the same Opinion, because when the Money is recovered against the Hundred to be levied, they might be worth something. 1 *Mod.* 71. 2 *Keb.* 713.

Parishioner.

It was held in the Case of *Meredith* against the Hundred of *Wattlington*, *Pascb.* 1657. That a Parishioner is not a competent Witness to prove the Bounds of a Parish where he is an Inhabitant, although he pay neither Scot nor Lot, but receives Alms of the Parish, because he is subject to the Watch and Ward, and so is concerned something, though not so much as others. *Sty. N. P. R.* 571, 572.

Pardon.

Felons.

Excommu-
nicate.

If one be attainted of Felony and pardoned, he cannot be either Juror or Witness. *Contra per Coke.* 2 *Bu'str.* 154. *Brown* and *Crashaw*. Nor can a Recusant Convict be a Witness, for he is a Person Excommunicate.

Mich. 21

Car. 2 B. R.

The King

against Paris.

2 Keb. 572.

Feme Covert.

1 Vent. 49.

1 Siderf. 431.

In an Information against *P.* That whereas he hath cheated one *Lee* in a Match, to the Intent that the Lands of this *Lee* should be charged before Marriage, he procured the Feme to acknowledge a Judgment to him, where in Truth no Debt was due by the Feme; in this Case the Feme was admitted a Witness for the King, though the Profit of the Husband was collaterally concerned; for by this Evidence if it be found against *P.* the Judgment shall be set aside.

Trustee.

2 Keb. 128.

A Trustee may be a Witness if he release his Trust; so if he be in Possession of the Lands in Question as Servant. *Siderfin* 315.

On a Trial at Bar it was held *per Hale*, That an Executor may be a Witness in a Cause concerning the Estate, if he hath not the Residue given him. 1 *Mod.* 107.

Trustee.

Legatee.

In an Information of Forgery for publishing a forged Deed, importing the Revocation of a Will, to the Prejudice of the Executors and Legatees; 'twas resolved by all the Barons of the Exchequer, upon Conference with the Judges

Judges of the King's Bench; 1. That a Trustee who has conveyed over his Estate in Trust, or has assented thereunto, cannot be a Witness for the King in this Case; nor can a Legatee, or any other Person that is a Loser by the Deed, or may receive any Advantage by the Verdict's being found for the King. *Hardres Rep.* 331. *Watts's Case.*

But in Deceit for forging a Will, a Legatee was allowed and sworn as a Witness in the Trial for Forgery; for this makes nothing to the Probate of the Will, or Recovery of the Legacy in the Spiritual Court, nor do they take Notice of it.

It was resolved in one *Long's Case*, That ^{Usury.} upon an Information upon the Statute of Usury, ^{Per Twisden} the Person who borrows the Money may be a ^{22 Car. 2.} Witness after he hath paid the Money, but not ^{B. R.} before. *Mich. 22 Car. 2. B. R. per Twisden* 191. Justice.

If *A.* indict *B.* on the Statute 5 *Eliz. cap. 9.* ^{Perjury.} of Perjury, as a Party grieved, the Prosecutor ^{Prosecutor.} cannot be a Witness against *B.* *Roll.* 685. 2 Part.

Judgment staid, because the Verdict was ^{Perjury.} had upon the Testimony of one Witness, and he since convict of Perjury in the same Thing. *Pas.* 17 *Car. 2. B. R.*

There ought to be two, where the Trial is ^{Two Wit-} by Witnesses. ^{nesses.}

In *Benner's Case*, *Style* 223. In a Trial at Juror. Bar, it was said by the Court, That if either of the Parties to a Trial desire that a Juror may give Evidence of some Things of his own Knowledge to the rest of the Jurors, that the Court will examine him openly in Court upon his Oath, and he ought not to be examined in

Robbery.

private by his Companions. And it was also said, That if a Robbery be done *in Crepusculo*, the Hundred shall not be charged; but if it be done by clear Day-light, whether it be before Sun-rise, or after Sun-set, it is all one, and the Hundred shall be charged.

Witnesses for Prisoners to be sworn.

By 1 *Annæ*, cap. 9. Witnesses for Prisoners upon Trials of Treason, or Felony, shall be sworn as Witnesses for the Crown are, and be Subject to like Punishment for Perjury.

Inhabitants may be Witnesses concerning Highways and Bridges.

By 1 *Annæ*, cap. 18. It is enacted, That in all Informations and Indictments in any Court of Record at *Westminster*, or at the Assizes or Quarter-Sessions, for not repairing their Highways or Bridges, the Evidence of the Inhabitants of the Town or County in which such decayed Bridges or Highways lie, shall be admitted.

Quaker falsifying on his Affirmation, to be punished as for wilful Perjury.

By 7 & 8 *Wil.* 3. cap. 34. It was enacted, That every Quaker who shall be required to take an Oath on any lawful Occasion, instead of the usual Form, shall be permitted to do it in the Form prescribed by this Act: And if he shall be convicted of having done it falsely or corruptly, he shall incur the same Penalties, as other Persons convicted of wilful Perjury: But that no Quaker, or reputed Quaker, should be qualified to give Evidence in any criminal Cause by Virtue of this Act.

Quaker disabled to give Evidence in Criminal Causes.

Witnesses to prove a nuncupative Will.

By 4 & 5 *Annæ*, cap. 16. It was enacted, That such Persons as are deemed good Witnesses in Trials at Common Law, should be deemed good Witnesses to prove a nuncupative Will, or any Thing relating thereto.

Commissioners for Trial of Prisoners, Witnesses.

Persons in Commission for the Trial of Prisoners for High Treason, were allowed to be good Witnesses, and they came off the Bench, and

and gave Evidence accordingly. *Kelynge* 12. Witnesses may be examined apart by the Direction of the Court. 2 *Inst.* 131. *Guiliems & Ux* versus *Hulie & Ux*.

The same Persons who are Witnesses to the Indictment in Treason, may be Witnesses at the Trial *Kelynge* 18. If a Conspirator be examined before a Privy Councillor, or a Justice of Peace, and upon his Examination, without Torture, confesses the Treason, and this be proved by two Witnesses at the Trial; in this Case there needs no other Evidence to prove him guilty of the Treason. *Kelynge* 18. *Quære*, if not altered by 7 *W.* 3. *cap.* 3. By which Statute, unless the Party confesses the Fact in open Court, two Witnesses are required to convict him there.

Witnesses to the Indictment, Witnesses at the Trial.

Confession allowed Evidence.

Confession to convict one of Treason, must be in open Court.

At the Sessions at the *Old Baily*, 7 *Dec.* 1664. Exception was taken to a Witness, because he had been burnt in the Hand for Felony. But *Hyde* Chief Justice, *Kelynge*, and *Wylde* Recorder, held that to be no Exception; and in Civil Causes such Persons are frequently admitted Witnesses: That it differs from cutting off Ears, standing in the Pillory, &c. because those Punishments make the Persons infamous, but burning in the Hand does not so, because it comes in the Place of Purgation at the Common Law, which supposeth he might be not Guilty, notwithstanding the Verdict; and therefore at the Common Law, he that confesseth a Felony, could never be admitted to his Purgation; for there could be no Presumption of Not guilty against his own Confession. *Kelynge* 37, 38.

Person burnt in the Hand allowed a Witness.

Person convicted of Perjury.

Wicks versus *Smallbrook*, Mich. 13 Car. 2. B. R. Exception was taken to a Witness, for that he was convicted of Perjury, and they offered the Copy of a Verdict, (whereupon there had never been any Judgment) in the Time of *Oliver* the Protector; but the Court would not receive or allow of it, because all is gone and discontinued by the Alteration of the Government. But they agreed, that Evidence to prove him perjured, might now be given *viva voce*; and those of the other Side, to make his Testimony valid, produced a Pardon of the Perjury. But *per Cur.* that will not avail, for it cannot restore him to his Credit. 1 Sid. 51, 52.

Pardon cannot restore him to be a Witness.

In *Crosby's* Case, *Aaron Smith*, who had stood in the Pillory for instructing *Stephen College*, and had the Advantage of a general Pardon afterwards, was allowed to be a Witness. 5 Mod. 15. *Rex* versus *Crosby*.

Persons who have stood in the Pillory, whether they may be Witnesses.

Qu. If Persons convicted of framing a Libel, who have stood on the Pillory for it, may not be Witnesses; for the Disability seems to have respect to the Offence rather than the Punishment. *Rex* versus *Davis & Coster*, 5 Mod. 74.

Davis and *Carter* being convicted for forging a Bank-Bill, moved against the Sheriff of *London* for oppressing them in *Newgate*; but the Court refused to read their *Affidavits*. 5 Mod. 74.

Parties in the Crime may be Witnesses.

Persons guilty of the same Crimes (while they remain unconvicted) may be made Use of as Witnesses against their Fellows. *Kelynge* 17.

One who was taken and married by Force Wife married was allowed to be a good Witness against the Offender, although she was his Wife *de Facto*. forcibly, a good Witness of it.

1 *Vent.* 243. *Brown's Case*, 3 *Keb.* 193.

Indictment against *Mary Grigs* for marrying a second Husband, the former being alive; held that the first Husband is not a Witness to prove the first Marriage. *Raym.* 1.

In an Indictment against the Lord *Audley*, for assisting another to commit a Rape on his Wife, she was admitted a Witness against him. *Hut.* 115. 2 *Hawk, P. C.* 432. (a). Wife Witness against her Husband in a Rape on her by his Assist.

Men who claim under the same Title, shall not be Witnesses for one another. *Hob.* 91. ance.

In Ejectment, Defendant challenged a Witness produced by Plaintiff to prove a Lease made by the Dean and six Residentiaries of *Hereford*, because he was a Prebend at large; and held he was no Witness, because might assent. 2 *Keb.* 126.

In the Case of the City of *London* concerning the Duty of Water-Bailage, the Freemen of *London* were not allowed as Witnesses. 1 *Vent.* 351. But there is no general Rule, where Members of Corporations shall be admitted or refused to give Evidence, in Actions brought by or against the Corporation, but every Case stands on its own Circumstances, viz. Whether their Interest is so great that it may be presumed to make them partial or not. 2 *Lev.* 241. Members of Corporations sometimes allowed as Witnesses for them, and sometimes not.

Debt by the Company of Sadlers against *Jones*, on the Statute 1 *Jac.* 1. cap. 22. sect. 44. for making Saddles insufficiently, *contra formam Stat.* and so became indebted to them

(a) But in *Raym.* 1. this Case is denied to be Law; and in *Vent.* 244. it is doubted of by *Ld. Ch. J. Hale*,

for

for the Forfeiture; and three of the Company were disfranchised in order to be Witnesses. 6 Mod. 165.

The like was done in the Case of the City of London against the Hawkers. 3 Keb. 295. and in Case of Lord Dorset versus Carter. 3 Keb. 300.

Case for a false Return to a *Mandamus* to restore the Plaintiff to be an Alderman of *Canterbury*; the Defendant called seven Freemen of *Canterbury* to prove the Return true; and to take off their Evidence a By-Law was read, by which the Charges of this Return were to be paid by the Corporation; the Defendant then read a Release, whereby he released to the Corporation all Advantages, Contributions and Demands which he could have by that or any other Order; and *Rainsford* and *Twisden* held the Freemen could not be Witnesses; but *Jones J. contra*: But on a Bill of Exceptions the Court held the Freemen ought to have been sworn. 2 Lev. 236. *Jones T.* 116.

Case against the Town of *Uxbridge* for taking Toll on Market-Day; none of the Corporation can be a Witness for the Town. 3 Keb. 12.

If an Infant brings an Action by Guardian, he cannot be a Witness. *Gilb. Law of Evid.* 122, 123.

Parishioners
may be Wit-
nesses of Mo-
ney mispent
by Church-
wardens, &c.

In all Actions to be brought in the Courts at *Westminster*, or at the Assizes, for Monies mispent by the Churchwardens or Overseers, the Evidence of the Parishioners (other than such as receive Alms) of the Parish where the Defendants are Inhabitants, shall be taken and admitted. 3 & 4 W. & M. cap. 11.

In an Information against the Defendant for Indictment a Cheat, upon Trial the Fact appeared to for a Cheat be, that he had a Promise of a Note for 5 *l.* in procuring from his Mother-in-law, and by some Slight a Note from got her Hand to a Note of 100 *l.* *Et per Holt, H.* C. J. The Mother cannot be a Witness, being *H. was not concerned in the Consequence of the Suit, allowed a Witness.* which is a Means to discharge her of the 100 *l.* for though the Verdict upon this Information cannot be given in Evidence in an Action upon the Note for the 100 *l.* yet we are sure to hear of it to influence the Jury; and he said he could not distinguish this from the Cases of Perjury or Forgery, where the Party whose Interest is defeated or prejudiced by the Deed, &c. is no Evidence to prove the Perjury or Forgery. *Rex versus Whiting, Salk. 283.*

A Goldsmith's Note is Evidence of his receiving Money. *Ibid.*

Indictment for a Cheat done to *J. S.* by imposing upon him a Quantity of Beer mix'd with Vinegar, and Grounds of Coffee, for Port-Wine; one of the Defendants pretending to be a Broker, and the other a *Portuguese* Merchant, for the better carrying on of the Cheat. *Et per Holt Ch. J.* *J. S.* was allowed to be a Witness to prove the Fact upon the Trial; for in such private Transactions, no body else can be a Witness of the Circumstances of the Fact, but he that suffers. *Regina versus Maskartney & al, Salk. 286.* One who was cheated admitted to prove the Fact in the Indictment.

Case by a Silk Dyer against his Servant for Money received to his Use; and on Evidence it appeared that *A.* sent Silk to be dyed by the Plaintiff, that the Plaintiff sent it home by the Defendant, and *A.* was called to prove he paid Defendant

Defendant

Defendant for it; but held by *Holt C. J.* that he was not a Witness. *Mich. 8 Ann. at Guild-Hall, Tybbald versus Treggot.* Report of Cases in Queen Anne's Time 261.

Evidence in an Action for running over the Plaintiff's Barge with a Ship.

In an Action on the Case for managing the Defendant's Ship so negligently, that it ran over the Plaintiff's Barge, the Declaration set forth, That he was possessed of the said Barge, laden with divers Goods and Merchandizes. And 1. *Holt Ch. J.* would not suffer the Pilot to be a Witness, because he was answerable, if faulty in steering, to the Master. 2. He would not suffer any Damages to be recovered for the Goods, because not set forth particularly, saying, they ought to be set forth specially; as where an Action is brought for burning his House: So in Case for Words *per quod* she lost her Marriage with *J. S. & aliis personis*, he said, he would not suffer them to give in Evidence a Loss of Marriage with any Body but *J. S.* *Martin versus Hendrickson, Salk. 287.*

Son took the Father's Money, and gave it to *H.* and the Son's Evidence admitted in Trover against *H.*

In Trover for Money, the Case was upon Evidence, That the Plaintiff's Son had a general Authority from his Father to receive and pay out his Father's Money. The Son took a Bill for Money due to his Father, and received it without a particular Authority for that Purpose; and this Receipt was with an Intent to imbezil and spend it; but he gave a Receipt as for Money had to his Father's Use, and this Money was given to the Defendant. The Questions were, 1. If the Son could be a Witness in this Case to prove the Delivery? And 2. Whether the Father could maintain an Action of Trover? *Holt Ch. J.* was of Opinion, That the Son might be admitted as a good Witness,

Witness, his Testimony being corroborated by other Circumstances. And that the Action was maintainable by the Father, for that the general Authority the Son had to take his Father's Money, made the Receipt of the Money to be to his Father's Use, and a good Discharge of the Debt, so as the Father could not avoid the Payment, and charge the Person that paid the Money with an Action: And then if the Payment was a good Discharge, it is Reason it should be his Money, and the Possession of the Son is the Possession of the Father, the Son being to this Purpose as his Father's Servant: And according to this Opinion the Plaintiff had a Verdict; but he said he was willing to have a Case made of it; but the Defendant acquiesced in his Opinion. *Anonymous, Salk. 289.*

The Plaintiff brought an Action upon a *Quantum meruit* against the Defendant, for that he, at his Request, had served him as a Commissioner in a certain Commission out of the Exchequer, directed to him and others for Examination of Witnesses: After Verdict on *Non Assumpsit*, *Tremaine* moved in Arrest of Judgment, That the Plaintiff acted by Command of the Court, and could not therefore take a Promise of Reward for the Service, no more than a Sheriff or Bailiff; *sed non allocatur*; for he is appointed at the Nomination of the Party, who ought to pay him if he employs him. *Stockbold versus Collington, Salk. 330.*

*Of Evidence relating to Executorship, Wills
and Administrations. (a)*

Roll. Trial,
678. pl. 1.
*Plene admini-
stravit.*
Pedigree.

An Account given to and allowed by the Ordinary, is not good Evidence; nor a Pedigree by a Herald at Arms, to prove an Heir; but it must be proved by Deeds, Records, or Witnesses.

A Witness to a Deed, becoming Administrator, &c. his Hand may be proved. 1 *Str.* 34.

Devastavit. In Debt against an Executor, suggesting a *Devastavit*, any Evidence that proves Assets, is not sufficient, but an actual *Devastavit* must be proved; for now the Party is chargeable in his own Right. *Keb.* 2 Part 676.

Assets.

Upon *Plene administravit*, if it be proved that the Executor hath Goods of the Testator's in his Hands, he may give in Evidence, that he hath paid of his own Money for the Testator, to the Value of these Goods. *Co. Lit.* 283. *Dyer* 2.

The Plaintiff may say, he sold the Land by the Appointment of the Testator. 3 *H.* 6. 3. *Roll. Executor*, 920. pl. 2.

Assets.

If the Issue be in a Suit against an Executor, Administrator, or Heir, Assets in *London*, to prove Assets in another Place, is sufficient. *Lib.* 6. 47. *Dyer* 271.

On *Plene Administravit*, it was proved, that on the Day of suing out the Writ, a Sum of Money more than the Plaintiff's Debt was

(a) The Act or Order of Ecclesiastical Court for granting Letters of Administration proved by the Book, is Evidence. *Vin. Abr. Tit. Evid.* 81. pl. 1.

brought

brought into the Spiritual Court, and was delivered to the Executors as a Debt due to the Testator; but that he immediately, by the Order of that Court, paid the same to another Creditor. Held that this Sum was Assets, tho' the Plaintiff's Writ was only purchased the same Day. *Dyer* 108.

Upon *Plene Administravit*, it was proved at the Trial, that the Executor had discharged a Debtor of the Intestate out of *Ludgate*, taking a Bond from him for the Debt; and tho' it appeared that this Debtor was so extreme poor that he was starving, yet the Debt was judged Assets in the Executor's Hands. *Report in Holt's Time* 297. *Cases W.* 3. 346.

Upon *Plene administravit*, the Executor cannot give a Judgment in Evidence, *Keilw.* 59. nor Payment of Debts by Contract, in Debt brought upon an Obligation. A cup pawned and redeemed with the Executor's own Money, is good Evidence; but a Recovery ought to be pleaded. *Roll. Trial*, 684. *pl.* 7, 9.

Plene Administravit. But an Outlawry of the Testator is Evidence upon *Plene administravit.* *Keb.* 2 Part 745.

Case against Executors, and on *Plene Administravit* pleaded, it was proved, that *J. S.* was bound to the Testator in 100*l.* for Performance of Covenants which were broken, that the Executors had sued this Bond; and then referred it to Arbitrators, who awarded *J. S.* to pay 70*l.* and Releases to be given. Held, that the Executors were in Law to be taken to have Assets to the whole 100*l.* 3 *Leon.* 53.

In Case against an Executor; whereas the Testator was indebted to the Plaintiff, the Executor promised to pay the Debt, in Consideration the Plaintiff would forbear to sue

him; the Executor may give in Evidence upon *Non Assumpsit*, that there was no Debt, or that he had no Assets *tempore promissionis*, for then there would be no Consideration. *Lib. 9. 94. William Bane's Case.* Upon the Issue *Ne unques Executor*, to prove an Administration granted to him, is good Evidence. *Dyer 305.*

Held *per Holt, C. J.* That on *Ne unques Executor* you cannot give Letters of Administration in Evidence, but Letters *ad Colligendum* you may (a). *Comberb. 221.*

*Ne unques
Executor.
Spiritual
Courts.*

In Trover brought by an Executor, the Defendant pleaded *Ne unques Executor*. The Defendant shall not give in Evidence that the Will was forged, because the Will was under the Seal of the Ordinary, to whose Examination it belongs, as to Goods; but Forgery of the Probate, or a Revocation, may be given in Evidence, because these Things are in Affirmance of the Spiritual Proceedings; so of an Administration, that there are *bona notabilia*, may be given in Evidence, but not *Non compos mentis*. *Sid. 359. Keb. 2 Part 337.*

On *Plene Administravit*, the Plaintiff replied Assets *die exhibitionis Billæ, scilicet 23d of October*; and in Evidence it appeared, that the Bill was not filed till 14 Days in Term. Held, what the Defendant had paid before the actual filing of the Bill was not Assets. *1 Siderf. 432.*

That the Executor paid a Legacy, is Evidence that he had Assets.

(a) If there be Judgment against an Administrator by the Name of Executor, and he be sued afterwards as Administrator for the same Cause, he may give the former Judgment in Evidence. *Comb. 221.*

Will, the Probate is good for the personal Estate, but not to prove a Will in Writing of Land, by the Statute. 2 Roll. 678.

What shall be given in Evidence, and what is good Evidence.

Upon this Plea the Executor may give in Evidence a Retainer for a Debt due to himself of as high a Nature; or Payment of Debts with his own Money, and that he kept Goods of the Testator in lieu; for this alters the Property. Roll. Trial, 684. pl. 8.

Plene administravit.
1 Cro. 128.

On *Plene Administravit*, the Defendant cannot prove, that he promised to pay J. S. the Testator's Debt; but otherwise if he had given a Bond for it. Clayton 88.

The Original need not be shewed in Evidence upon this Plea; nor upon the Issue Assers at the Day, &c. because the Day is agreed in pleading; yet see Syd. 462.

2 Sid. 226.
Rogers *versus* Rogers.

Debt against an Administrator; he pleads, That the Intestate was indebted to him by diverse Bonds, [reciting them] to the Sum of 80*l.* and that he had not Assers *ultra*. The Plainiff demurred, because it amounted to the General Issue of *Plene administravit*; but held the Plea was good, and that this was no Cause of Demurrer. Hob. 127.

Agreed by the whole Court, that if in Evidence the Executor give in Evidence the Probate under the Seal of the Ordinary, nothing can be given to the contrary that he is not Executor; for Causes Testamentary belong intirely and originally to the Ordinary; and if the Will be forged, the Suit ought to be in the Spiritual Court to repeal the Probate, according to 4 H. 7. 12. So of Letters of Administration, it cannot be alledged that there was a Will; but if there be a Suit, it

Pasch. 2 Car.
2. B. R. 68.
Nowel *versus* Wilfon.

Will.

408 *Of Evidence relating to Executorship, Ch. 15.*

must be in the Spiritual Court to repeal it. Yet some Books seem to the contrary, as *Fitz. Estoppel*, 9. *Bro. Testm.* 4. 22 *H.* 6. 52. 21 *E.* 4. 50. *a. Com.* 282. 9 *Co.* 31. *a. Old Entries* 325. 1 *Brownl.* 79. Also upon Evidence it may be proved, that the Probate or Letters of Administration were forged.

Administra-
tion.

In Debt by an Administrator upon an Obligation, the Defendant pleads *Non est factum*; the Plaintiff in Evidence need not to shew the Letters of Administration, for this is admitted by the Defendant's Plea of *Non est Factum*.

If Letters of Administration be given in Evidence, you may shew they were revoked. *Gilb. L. of Evid.* 75.

Will.

A Will, under which a Title to Land is made to the Plaintiff, must be shewn itself to the Court, and the Probate itself is not sufficient. 1 *Keb.* 117. The same Case cited 2 *Roll.* 678. between *Bret* and *Bret*, 10 *Car.* 1.

Pasch. 1651.
Will.

The Copy of a Will, according to the Book of the Register in the Court Christian, shall not be admitted to prove a Will of Lands, except the Possession has gone a long Time accordingly.

Probate.

2 *Roll.* 678. adjudged, That Probate of a Will by Witnesses for Lands, is not Evidence at Common Law, although the Probate was good as to the Personal Estate devised. Between *Bret* and *Bret*, *Hill.* 10 *Car.* 1.

Plene admini-
stravit.

Upon *Plene administravit* pleaded, the Account given to the Ordinary shall not be given in Evidence, nor any Respect shewn to it. 2 *Roll.* 678. *Turvie's Case*, *Pasch.* 7 *Jac.* per *Cur.*

Debt

Debt against an Executor, upon *Plene administravit*, it appeared that the Executor meddled and administered, and then refused in Court, and Administration was granted to another; and that several Sums were recovered against the Administrator; it was said by *Periam* Justice, 1. That if an Administrator (who is a Stranger) administer, without the Commandment of the Executor, the Executor cannot give such Administration in Evidence to prove this issue. 2. That in the principal Case, the Executor having administered, he could not refuse, and so the Administration is granted without Cause, and what he did was without Warrant, and no Administration. 1 *Leon.* 154. *Hawkins* and *Lawse's* Case. At *Bury* Assizes, 1682. before Judge *Wyndham*, The Executor gave the Administration of the Administrator in Evidence, and allowed; but there what the Administrator did, was by the Executor's Consent. In Mr. *Lun* and his Mother's Case.

An Executor *de son Tort* cannot give in Evidence his Retaining of Goods to pay himself; for he cannot retain; but if he take out Letters of Administration, although *pendente lite*, he may retain for a Debt of as high a Nature, and plead this in Bar; for the Administration purges his Wrong; and although he shall not abate the Writ by taking out Letters of Administration, yet he may plead this in Bar. *Style's Reports* 338.

had the Judgment was denied to give Evidence about his Debt, for he sweareth to have Assets for himself, and is interested in the Thing. Before Judge *Wyndham*; at *Bedford* Assizes, 1682.

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Assets.

In Debt against Executors, and *Assets inter manus* in Issue, 'tis good Evidence that they sold Land, by the Will of the Testator, &c. and that they had the Money paid; that they recovered Damages in Trespals for Goods taken in the Life of the Testator, &c. 3 H. 6. 3. *Roll. Executor*, 920. pl. 1, 2, 4.

Debt against two Executors; and on *Plene administravit* an Inventory exhibited by one shall not charge the other. *Clayton* 106.

Trover by Administrator on the Intestate's Possession, Defendant cannot give in Evidence a Will on the General Issue.

The Plaintiff brought Trover as Administrator, and declared upon the Possession of the Intestate; and upon Not guilty pleaded, at the Trial the Council for the Defendant offered to give in Evidence, that the pretended Intestate made a Will and an Executor. But *Holt* Ch. J. over-ruled it, and took this Diversity, That where an Administrator brings Trover upon his own Possession, the Defendant may give in Evidence a Will, and an Executor upon Not guilty: Otherwise if it be on the Possession of the Intestate, (as in the principal Case) for there the Defendant ought to plead it in Abatement; and if he does not, he shall not give it in Evidence. *Blainfield* versus *March*, *Salk.* 285. *Parrell.* 181.

Otherwise, If on the Administrator's own Possession.

Payment of Money due to the Wife as Executrix, is not Evidence to maintain Action for Money received to Husband's Use.

In an Action on the Case for Money had and received to the Plaintiff's Use; upon the Evidence it appear'd, that the Plaintiff's Wife was Executrix, and that the Money was paid to the Defendant as due to her; and the Plaintiff was nonsuited, because the Action ought to have been brought by Husband, and Wife as Executrix; for it being paid without any Authority from the Husband, it remains as a Debt.

Debt due to the Executrix; and if the Husband dies, the Wife may bring an Action for it: But if the Money had been received by Authority from the Husband, then it had been as his Receipt, and as his Money, and the Action might well have been brought in his Name; and the Money would have been Assets in her Hands. *Anonymus, Salk. 282.*

In an Action upon the Case against an Executor, upon *Plene administravit* pleaded, three Points were declared *per Holt, Ch. J.* 1. That the Plaintiff must prove his Debt, otherwise he shall recover but a Penny Damages, though there be Assets; for the Plea only admits the Debt but not the Quantity. 2. That all separate Debts mentioned in the Inventory, shall be counted Assets in the Executor's Hands; for that is as much as to say, they may be had for demanding, unless the Demand or Refusal be proved. 3. That in Strictness no Funeral Expences are allowable against a Creditor, except for the Coffin, ringing the Bell, Parson, Clerk and Bearers Fees, but not for a Pall or Ornaments. *Skelley's Case, Salk. 296.*

In Debt, *Plene administravit* admits the Debt; and if to Debt on Bond on *Plene administravit* you offer to prove Payment of a Bond, you must prove that that Bond was sealed and delivered. *1 Shower 81.*

A Note had been made by the Defendant to the Plaintiff's Testator above six Years before the Action brought for Payment of the Money; and upon *Non assumpsit infra sex Annos*, at the Trial before *Holt Ch. Justice*, the Plaintiff gave Evidence of a Promise made to himself after the Arrest, and before the Bill exhibited; and whether this Evidence maintained

the Declaration was the Question : and the Case of *Heylin* and *Hastings* was remembered, wherein upon Conference with all the Judges of *England*, it was held, that a Promise after the fix Years brings the Matter out of the Statute of Limitations ; that owning the Debt does not go so far, but is Evidence of a Promise.

Note ; Here the Declaration was of a Promise to the Testator, and the Promise in Evidence was to the Executor.

And the Court said, here the Executor might declare of a Promise to himself : But *adjournatur*. And in *Hillary* Term, upon Conference with all the Judges it was held, the Evidence did not maintain the Declaration. *M. 3 Ann. Dean v. Crane* in *B. R. 6 Mod* 309. *1 Salk.* 28. *S. C.* See *Ld. Raym.* 389, 422, 741, 838, 1101. *Caf. temp. W.* 3. 223, 234, 444. *Caf. temp. Mac.* 314. *2 Wms.* 373. *3 Wms.* 84, 89, 143, 144. *Comyns* 54.

Ordinary cannot refuse Probate to an Executor because *Incapax*.

A *Mandamus* issued to grant Probate of the Will ; the Ordinary returned, That the Executor was an absconding Person, *Incapax*, &c. And this Return was held insufficient ; for that there is a Will is admitted ; and since the Testator has thought the Executor a proper Person to be intrusted with his Affairs, the Ordinary cannot adjudge him otherwise upon a Disability by the Canon Law, for that is not admitted here, but as far as it has been received from Time immemorial. *Per Holt C. J.* and a peremptory *Mandamus* was granted : Neither can the Ordinary insist upon Security from the Executor ; for the Testator has thought him able and qualified, and he has a temporal Right, which he cannot sue for before Probate : And there have been no Precedents

or Practice of this Nature. *The King versus Raynes*, *Salk.* 299.

If an Executor confesses or suffers Judgment by Default, he admits Assets in his Hands, and is estopped to say the contrary. *Salk.* 310. 6 *Mod.* 308. says, if an Executor suffer Judgment to go against him by Default, upon Executing Writ of Inquiry, he shall not give Evidence the want of Assets, for he is estopped, as if it had been in case of an Heir; for he should have pleaded *Plene administravit*, or specially what Assets he had. *Per Cur.*

In Debt upon a Bond against an Administrator, he pleaded several Judgments, & *riens ultra 5 s.* which was found: The Plaintiff as to one Judgment replied, there was but so much due, which the Debtee was willing and ready to accept in full, and that the Defendant by Fraud deferred the Payment of that Money, and the Judgment was kept in Force to defraud the Creditors, and replied the same Matter as to another Judgment, and demurred as to the rest. The Defendant rejoined that as to one Judgment, it was not kept on Foot by Fraud, &c. and as to the other, no Assets *ultra* so much, which was liable to the Judgment; and so to the third; and as to the rest joined in Demurrer. *Et per Cur.* 1. The best Way for an Administrator to plead, is to plead truly and honestly; and though there is a Judgment for a Penalty, he ought to plead the Judgment, and shew how much is due. 2. If he pleads several Judgments, and any one Judgment be ill pleaded, or found fraudulent, the Plaintiff shall have Judgment. 3. If an Administrator Pleading of Judgments is a Confession of Assets to satisfy them, and the *Riens ultra* a certain Sum is not material.

Executor pleading Judgments with Penalties should shew how much is really due.

pleads

pleads twenty Judgments, 'tis a Confession of Assets to satisfy the twenty Judgments, and the *Riens ultra* 5 s. is but Form, not material nor traversable. 4. If a Judgment being pleaded, and *per fraudem* replied, issue is taken thereupon, and by Evidence it appears the Debtee was willing to take less than is recovered, it is Evidence of Fraud: But if it be shewed that the Administrator had not Assets to pay that Sum, it is no Fraud. 5. If an Administrator pleads two or more Judgments, and the Plaintiff confesses the Plea to be true, and prays Judgments of Assets *in futuro*; if afterwards Assets came to his Hands, he may satisfy the Judgments pleaded, for the Judgment of Assets *de futuro*, is only to be paid off after the other Judgments are satisfied; and therefore there is no Inconvenience in making the Pleading of fraudulent Judgments a Confession of Assets. 6. The Conclusion of the Replication with *hoc paratus est verificare*, to every Judgment, is well; but a general Conclusion to the whole had been better. *Vide 2 Saund. 338. Salk. 211. Parker versus Atfield.*

Will made by
a Wife in
pursuance of
a Power re-
served before
Marriage, is
not properly
a Will, nor
provable by
the Ordinary.

A Woman by Deed settled her Estate in Trust, reserving a Power to herself to give by her last Will and Testament, as she should think fit, so much of her Estate in Legacies; and this was done before Marriage, with the Consent and Privy of the intended Husband, who refused nevertheless to be a Witness or Party to the Deed: The Marriage took Effect. The Wife made a Will and died, and the Executors proved the Will. *Et per Holt Ch. J.* This is not a Will, neither ought the Ordinary to prove it; if he does, a Prohibition lies.
Where

Where a Woman is Executrix and marries, there she may make a Will with Consent of her Husband, and cannot without. 1 Jones 157. So if a Woman having Debts due to her marries, she may make a Will *quoad* these, and the Ordinary may prove it. In other Cases she cannot, for it is only a Writing in Form of a Will: However, in the principal Case, it appearing that the Ordinary had only granted Administration *quoad* the Goods in this Will, 'twas allowed as reasonable. *Cro. Car.* 219. *Shardelov versus Naylor, Salkeld* 313.

Sir Charles Hopson made Churchill and Goodwin his Executors, Men of Good Credit: Goodwin being a Banker received all the Money; but Churchill joined with him in the Receipts, taking his Note to shew that he received not the Money. *Et per Harcourt* Lord Chancellor; If two Trustees join in a Receipt, and one receives the Money, he only that receives shall be liable; if there be two Executors, and they join in a Receipt, and one only receives the Money, as to Creditors, who are to have the utmost Benefit of Law, each is liable for the whole, though one Executor alone might give a Discharge, and the joining of the other was unnecessary; but as to Legatees, and those claiming Distribution, who have no Remedy but in Equity, the Receipt of one Executor shall not charge the other; for the joining in the Receipt is only Matter of Form, the substantial Part is the actual receiving; and this only is regarded in Conscience. *Churchill versus Hopson, in Canc. Salkeld* 318.

Parol Evidence not admitted to contradict Parol Evidence the Words of a Will. *M. 20 G. 2. Lovefield v. Stoneham, Exec. in B. R. 2 Str.* 1261.

In

In proving a Will according to the Statute of Frauds and Perjuries, if *one* Witness prove that the other *two* were there present, this is a Proof sufficient of such Will, without having all the Witnesses thereto to prove it; for then it is proved by a Witness that the Will was executed according to the Method required by the Statute, unless they shew such Characters of Fraud as will make it necessary to produce the rest. *Gilb. Law of Evid. cites T. Ass. 1701. in Kent. 2 Wms. 509, 510.*

Indictment for forging a Will relating to personal Estate; and on the Trial a Forgery was proved, but the Defendant producing a Probate, that was held to be conclusive Evidence in support of the Will. *1 Str. 481.*

Evidence in particular, under the following Heads.

1. Acts of Court.

Two Commoners on Behalf of themselves and all the Commoners in *H.* preferred a Bill in the Dutchy Court against the Owner of the Land in which they claimed Common, and upon Hearing the Common was decreed. The Court was put down; and the *now Defendant* having purchased Land in *H.* the *now Plaintiff*, who was a Commoner when the Decree was made, tho' *no Plaintiff* in that Cause, brought his Bill against the *now Defendant*, to have the Use of the *Depositions* taken in the former Cause, at a Trial to be had at the Assizes; and the Defendant demurred to the Bill, and the Demurrer was allowed, as neither the *now Plaintiff* or *Defendant* were Parties to that Suit, though
the

the Suit was of general Concernment, and the Suit *there* the same with the *present*, and that the Defendant *here* claimed under the Defendant *there*. *Vin. Evidence*, 81.

2. *Acts of Parliament, Proclamations, Rolls, &c.*

An Act printed by the *King's Printer* is always allowed good Evidence of the Act to a Jury, but was never yet allowed to be a *Record* without an Exemplification under the Great Seal, and it must be pleaded as exemplified. *Ibm.*

A *private* Act printed among the *public* Acts hath been allowed in Evidence; even a *private* Act in print, which concerns the *whole County*, as that of *Bedford Levels*, may be given in Evidence without comparing it with the Record. *Ibm.*

Antient Usage for 3 or 400 Years is good Evidence of a *Law*, if an Act of Parliament be lost or imbezilled, the Law still remains. *Ibm.*

A printed Copy of a *private* Act or Ordinance obsolete, was disallowed by all the Court to be given in Evidence, unless it had been examined by the Original. *Ibm.*

Tho' Acts of Parliament, and the Inrolment of them, are destroyed by Fire, Rebellion, or Injury of Time, yet, if by any Circumstances and Proofs they may be manifested, they have the Force of Acts; as by antient Copies, Transcripts, Books, Pleadings, and Memorials; but the Court must not permit the same to be put in Issue by a Plea of *nul tiel Record*. No printed Statute is Evidence on *nul tiel Record*, but must be exemplified under the Great Seal, *Ibm.* 82.

Upon

Upon View of the Parliament Roll of the Statute 2 E. 6. for Payment of *Tithes*, and comparing it with the Declarations in the Causes between *Bowes* and *Broadhead*, and *Burreston* and *Herbert*, it was found that the Statute was rightly recited, notwithstanding the *Journal Book* of Parliament was produced to the contrary, and thereupon Judgment was given in both Cases; for the Court is to be ruled by the Parliament Roll, and not by the *Journal Book*. And the same Day in a like Case between *Boyer* and *Tantulyar* for the like Reason, and the Court ordered the Parliament Roll to be brought into Court, to shew whether an Adjournment in Parliament was well recited, and would not credit the *Journal Book*, *Ibm.* 123.

In Case of a Wager about the Day on which the Peace was proclaimed, it was held by *Holt* Ch. J. that a *printed Proclamation* was good Evidence, though not examined by the Record, inrolled in Chancery, nor proved to have been under the Great Seal; but must be examined by the Original. *Vin. Evidence*, 129.

3. Admission of the Party.

A finding by special Verdict, or the Admission on former Pleadings, is good Evidence, unless the contrary appear. *Vin. Evidence*, 82.

In an Action for Work done, &c. the Plaintiff to charge the Defendant gave in Evidence, a *Copy* of a *Bill delivered* to the Defendant, and copied by Order of the Defendant, and divers Exceptions were taken to the Bill, as to Quantities, Values, and private Marks; and it was ruled by *Holt*, Ch. J. that this *Copy* of

of a Bill delivered was Evidence, as a Copy of a *Bill*, and not Copy of a Copy; and the Objection to Price and Quantity is not Part of a Confession, or more than a Cavil. *Ibm.*

4. *Affidavit.*

A Man being about to convey to a Purchaser, made *Oath* before a Master in Chancery, that there was no Incumbrance on the Estate; in an Ejectment brought, this *Affidavit* was produced in Court, but not suffered to be read more than as a Note or Letter, unless the Plaintiff would produce a Witness to swear he was present when the Oath was taken before the Master. *Ibm.*

The Plaintiff or Defendant may make Affidavit in their own Cause, and it may be filed, but is not to be admitted in Evidence in the Trial of a Cause between them. *Ibm.*

Though an Affidavit cannot be read in Evidence, yet if the Party who made it be sworn, and gives Evidence, his *own Affidavit* may be read *against him*, and this is allowable, to shew in what he contradicts himself. *Ibm.* 83.

On a Question on a Trial, whether the Property of Wine, &c. was in the Defendant, in order to ascertain whether Alien or *British* Custom was due for them, an *Affidavit* the Defendant had made at the Custom-house was given in Evidence, in which the Defendant swore the Wine was his. *Ibm.* 83.

5. *Antient Deeds, &c.*

An old Deed is good Evidence without Proof or Seal; but whether the Indorsement on a Bond by the Obligee, after his Death, and after thirty-five Years entring into it, shall be given in Evidence at Law, to take off an Objection to the Antiquity of it? see 8 *Mod.* 278.

A Deed found in the Archives of the Chapter of *Hereford* was read, to prove an Endowment of a Vicaridge, the only *concurrent* Evidence, as it appeared not to have been ever sealed or delivered. *Vin. Evid.* 84.

An *original antient Lease* could not be produced, but the Grandson of the Lessor produced a *Counterpart*, found amongst his Grandfather's Evidence, and though it had no subscribing Witneffs to it, it was yet allowed for Evidence; and *Wyndham J.* said he had seen many Deeds in *Q Eliz.* Time without any.

Where a Deed before Time or Memory is supported by Usage after, is *pleadable and good*; but the Books which say that Deeds before Time of Memory shall *not* be pleaded, are to be intended of Deeds of such Liberties and Franchises as cannot be claimed or supported by Usage *in Pais*, as if one claim *bona felonum* by Deed before Memory, he cannot shew his Deed, and say *Virtute cujus*, &c. but must shew an antient confirmation, or Claim and Allowance *in Eyre*; therefore to shew the Deed in the present Case, and a Usage to support it, is sufficient, and the other Way of Pleading it with a *Virtute cujus* would have been naught.

As

As to the *Date* of a Deed 'tis pleadable; tho' Time out of Memory, where it is a *private* Deed; but Grants of Franchises and Liberties must be allowed *in Eyre*, and so is 1 *Roll.* 4. 649. *pl.* 8. to be understood. *Ibm.* 8 $\frac{4}{5}$.

In the Case of Water Bailage in *London*, Evidence of constant Payment, and their *an-tient* Tables of Duties imported, was judged sufficient, though there can be no Prescription for it. *Ibm.* 85.

6. *Baron and Feme.* See *Marriage.*

7. *Belief.* *Hearsay.*

It is no Satisfaction for a Witness to say, that he *thinks* or *persuades* himself, &c. for, *per Coke*, the Judge is to give absolute Judgment, and to have more Ground than *Thinking*; and Judges, as Judges, are always to give Judgment *secundum allegata & probata*, whatever private Persons may think. *Ibm.* 86.

The Saying of *old Men* may be given in Evidence, in case of a *Modus*, but not on an Issue, *parcel or not parcel*; yet in a Question in Ejectment, whether a particular *parcel* belonged to one, or to the other, the Deed and Declaration of the Person who held *under both*, was allowed as Evidence by *Hardwick Ch. J.* at *Exeter*, 1735. *Vin. Evidence* 118.

In case of a *Murder*, what the *deceased* declared after the Wound given, may be given in Evidence. *Ibm.* But in *Trowter's Case*, *P.* 8 *Geo. B. R.* the Court would not admit the Declaration of the Deceased, which had been reduced into *Writing*, to be given in Evidence without producing the *Writing.* *Ibm.* 119.

Though *Hearsay* is not to be allowed as *direct* Evidence, yet it will serve to prove a Man was *constant* to himself, whereby his Testimony is corroborated.

In a Suit between *A.* and *B.* *A.* produced a Deed in a subsequent Suit between *C.* and *A.* it was *viva voce* proved that *A.* in a Cause between *A.* and *B.* produced such a Deed which proved so and so in particular. *Per Curiam*: This is good Evidence, for here *A.* if he pleases, may give that Deed in Evidence to controul the parol Testimony, and having the Deed in his Custody, which *C.* hath not, nor can produce. *Ibm.* 118.

To prove a *Discharge of Tithe*, by Unity of Possession, in the Hands of the Abbot, at the Time of the Dissolution, two Persons testified they had seen a Deed of *Appropriation* of the Parsonage to the Abbot, for which Reason they *verily thought* there was an Unity of Possession at the Time of the Dissolution; but this was ruled to be no Proof, for it may be intended not to continue, but they said that *Hearsay* shall be allowed for Proof. *Ibm.*

On a *Modus* alledged, it was agreed, that where the Statute appoints Proof of the *Surmise* to be by *two*, it is sufficient if *two affirm* that they have *known* it to be so, or that the *common Fame* is so. So on a *Modus* and Issue, the Witnesses said that for a long Time, as they *heard say*, the Occupiers of that Farm, &c. had used to pay annually to the Parson 3*s.* for all Tithe; and it was agreed that this *hearsay* Proof was sufficient to maintain the *Surmise* within the Statute 2 *E.* 6. *Ibm.*

Being *told* by Persons of good Credit, all along the Road, of the *Prorogation* of the Parliament, is good Evidence of *Notice* in an Action of false Imprisonment. So if a Witness swear in a Cause, and dies, *the Court* held, that in another Trial, one who heard him, may, upon Oath, repeat his Testimony, and it shall be good Evidence, if the *Record* of that Trial be produced, but not otherwise. *Ibm.* & 136.

8. *Books, Papers, &c.*

In *Case* for taking the Profits of the Under Clerk of the Treasury, a *Note* obtained by Lord *Finch*, formerly Master of the Office, of the Officers Subscription, that they were but Servants, which will not bind others, was refused to be given in Evidence *by the Court*, especially as Part had been cut off. *Vin. Evidence*, 136.

To prove taking the Oath, &c. in the Act of Uniformity, a Certificate was produced that had only a small bit of Wax upon it; yet, *per Twisden*, it may be read, and so we read *Recoveries* after the Seal broken off, and said he had seen Administration given in Evidence after the Seal broken off; and so of Wills and Deeds. *Ibm.*

Transfer Books of a Company have been allowed; as Evidence. *Ibm.* especially being the Books of a publick Company, and kept for publick Transactions, in which the Publick are concerned. *Ibm.* 89.

To prove the Custom of a Manor relating to Copyholders *cutting down Wood*, the Bookcase of 14 E. 3. *Fitz. Bar*, was given in, and allowed for good Evidence: So a Year

Book is good Evidence to prove the *Course of the Court*. *Ibm.* 138.

At a Trial at Bar concerning the Title of Land, a Copy of an *Inscription* upon a *Grave Stone* in *London* was admitted Evidence to prove a *Pedigree*: But a Charter of a *Pedigree* is no Evidence of itself, without shewing the *Books and Records*, from whence it is deduced to prove a *Descent*, though the *Heralds* swore the *Pedigree* was deduced from the *Records* and *antient Books* in the Office. Yet, *negatively*, a Book out of the *Heralds Office* was allowed to prove the Plaintiff was *not* descended from *W. Z. of P.* as also an *old Book*, in *Lord Oxford's Library*, mentioning the *Pedigree* of *W. Z. of P.* which was signed by himself. *Ibm.* 244. See 1 *Str.* 162.

Though *Heralds Books* are allowed to prove a *Pedigree*, the Reason is from *necessity*, because they have not better Evidence; and this is their proper Employ, and some credit is to be given to them, but they do not deserve much. *Ibm.*

Heralds Books were admitted Evidence to *Triers* of a Challenge, to prove *Cosinage* in the *Sheriff*. *Ibm.* 119.

So an *Inquisition post mortem* is Evidence, though not conclusive: So an *antient* *Heralds Book* to prove a *Pedigree*; but an *Extract* is not. So an original *Visitation Book* by the *Heralds* hath been allowed as Evidence; but an *Entry* in their Office is not good Evidence to prove a *Pedigree for an Heir*, for they are not *Matters of Record*, only *circumstantial Evidence*, and not the *Entries* of any public Office. *Ibm.*

In a Trial at Bar concerning the Right of Visiting *University Coll. Oxon*, one of the Issues was, whether *King Alfred* was Founder? and several Historians to that Point were offered in Evidence; but the *Chief Justice* declared such Evidence is never admitted, unless in Proof of a Point concerning *the Government*; and it was waived. *Ibm.*

Old MSS. found amongst the Evidences of a Family, may be Evidence, because *Originals*, but not a *Copy*, for that is liable to the Mistake of the Transcriber. *Ibm.* 101, 120, 244.

The Register Book of a Dean and Chapter are public Books, and Evidence: So a *Church Book* hath been admitted Evidence to prove Nonage; but the Entry of the Names and Titles of Persons in a *Church Book*, either for Births or Marriages, are not positive Evidence, without fully proving the *Identity* of the Persons, and also strengthened with *Circumstances*, as Cohabitation, or the Allowance of the Persons themselves. *Vin. Evidence*, 89, 235.

It is generally true, that where Books, as *Parish Books*, *public Corporation Books* are common Evidence for both Parties, they are like *Court Rolls*, which belong as well to the *Tenants* as to the Lord of the *Manor*, and each Party hath a Right to the Use of them. *Ibm.* 89, 90.

Survey Books, though antient, unless signed by the *Tenants*, or appear to be made at a *Court of Survey*, are no other than private Memorials, and no Evidence; but *old Court Rolls* are Evidence: So of *Rentals*, or *Accounts* of Money received by the *Steward*; but *Rentals*, without Money received and paid upon them, are nothing, 'tis the *Payment* makes them of Effect.

Effect. *Ibm.* See p. 131, 132. *Vin. Title Evidence.*

A *printed Book*, being an *Inventory* of the *State* of the late *South Sea Stock*, which was directed to be made by *Act of Parliament*, and to be left with one of the *Barons* of the *Exchequer*, and published by the *Authority* of the *Speaker*, was allowed as *Evidence*. *Ibm.* 91.

Where *Books* are lost in an *Earthquake*, so that the *Plaintiff* could not charge the *Defendant* otherwise than by his own *Books*, the *same Books* were admitted to be his *Discharge*. *Eq. Ca. Abr.* 10. cited as then lately adjudged in the *Case* of *Mellish and Turner*. *Ibm.*

9. Certificate.

In *Debt* against the *Sheriff* for the *Reward* given by the 6 & 7 *W. & M.* to those who should discover and convict *Clippers* and *Coiners*, the *Plaintiff* had a *Certificate* from *Holt Ch. J.* who tried the *Malefactor*, on his having been convicted on the *Plaintiff's Evidence*, which being produced, though under the *Ch. Justice's Hand*; was yet proved by my *Lord's Clerk* to the *Jury*. *Ibm.*

By Statute 6 *Geo. c. 20. §. 7.* The *Certificates of Clerks of Assize or Peace* are made *Evidence* of a *Person's* being convicted, and ordered for *Transportation*, so as to make him guilty of *Felony* without *Benefit of Clergy* for *returning*.

10. Circumstances.

De Morte Viri in *Dower* by the *Wife*, after the *Husband* had been absent seven *Years* beyond *Sea*, may be proved by *Circumstances*; for

for in such Cases *qui melius probat, melius habet.*

Ibm. 94.

A Man hath two Manors of D. and levies a Fine of the Manor of D. generally; *Circumstances* may be given in Evidence to prove what Manor he intended. *Ibm.* See *Vin. Trial*, 345. and the Books there cited.

Circumstantial Evidence ought never to be admitted where *better* may be had, *ex natura Rei*, for *Circumstances* are doubtful and fallible, and it is upon this Reason the Copy of a Record is good, where the Record itself cannot be had.

Ibm. See p. 99, 101.

II. *Confession.*

The *Confession* of the *Under-sheriff* of an Escape, is Evidence against the *Highb-sheriff*, for though the *Sheriff* be suable, yet the *Under-sheriff* gives him a Bond of Indemnity, and the whole will fall upon him; his *Confession* therefore is good Evidence, because in Effect he charges himself. *Ibm.* 95.

Confession of Delivery of Goods, in the Court of Requests, may be given in Evidence against the Defendant at Law: So in an Information for publishing a Libel, the Defendant's *own Confession* is Evidence against him; but then the *whole* must be taken together, and not *so much only* as serves to convict him. *Ibm.*

It is the worst Sort of Evidence that is, where there is *no Proof* of a Dealing or Transaction, or a Probability of Dealing between Parties. *Ibm.* 96.

12. Copies.

Wherever an Original is of a *public Nature*, and would be Evidence if produced, as a Bargain and Sale, Deed inrolled, Church Registr, &c. in such Case, a *sworn Copy* thereof will be good Evidence; but where the original is of a *private Nature*, a *Copy* is not Evidence, unless the Original be burnt or lost. *Ibm.* 101, 102.

By Statute 8 Geo. c. 25. §. 2. *Copies* of Recognizances, in Nature of a Statute Staple, signed by the Clerk or his Deputy, where the Original is lost, is good Evidence.

13. Coverture. See Marriage.

14. Court Roll.

As to the *Time* of a Surrender made, or Court held, the *Rolls* of the Manor are no conclusive Evidence, but shall be tried by the *County*. *Ibm.* 105.

Proclamation, whereby the Lord claims *Forfeiture* of a Copyhold, ought to be proved *vivâ voce*, and not only the *Court Rolls*; so held in Evidence to a Jury. *Ibm.*

To maintain *customary Descents*, *Presidents* in the *Court Rolls*, to prove the Usage, ought to be shewn, for without *such Proof*, though it had been *deemed*, or *reported* to have been the Custom, yet the Court cannot solely give Credit to the Proof by *Witnesses*.

If Proof be made of a *particular Benefit* which the Lord of the Manor is to have, the *Court Rolls* is the best Proof of it, for no Proof can be more directly or particular than the *Entries* in the *Rolls* in certain. *Ibm.*

14. Examination.

15. Examination.

Witnesses, as well in *criminal* as *civil* Causes, may be *examined* before a Judge, by Leave of the Court, where sufficient Reason appears to the Court; as going to Sea, &c. and in such Cases, the other Side may cross examine. *Ibm.*
114.

In a Trial at Bar of an Issue out of Chancery, to try if a Lease was made in pursuance of a Power, which was, to make Leases for the best Rent that could be got, a Witness was examined in Chancery concerning the Value of the Land, having been Collector of the Rents, and at the Time of his Examination in Chancery, he referred to, and consulted his Rental; but now at this Trial he was become blind, and therefore his *Examinations* and *Depositions* in Chancery were admitted to be read; for if he had been so ill as that he could not have come to the Trial, they had been good Evidence; and now by the Act of God he is disabled to consult his Rental, the same Reason therefore holds; he also gave Evidence of what he *remembered* besides. *Ibm.*

16. Exemplification.

See the Statute 3 & 4 E. 6. c. 4. 13 Eliz. c. 6. touching the *Exemplification*, or *constat* of Inrollment of Letters Patent, and making them Evidence; and also Statute 17 Eliz. c. 9. § 8. touching the *Exemplification* of Records of any Fine or Recovery inrolled, or any Part thereof, in the twelve Shires of *Wales*, or Counties Palatine, and making them Evidence.

Exemplification

Exemplification of Depositions taken in Chancery, to prove one's being of Age when he levied a Fine, was allowed as Evidence, and the Jury regarded it more than the Fine's being reversed for Nonage. *Vin. Evidence*, 115.

In Evidence to an *Essex* Jury at Bar in Ejectment, *Maynard* for the Defendant, offered an *Exemplification* under the Great Seal in 1588. of *Depositions* in Chancery, whereby a Conveyance made in 1586. and lost, was proved; and the Court agreed, that being *so old*, and the Records of the Rolls *burnt since*, it is good Evidence, and also in regard it was given in Evidence in a former Trial at Bar. *Ibm.* 116.

Copy of Depositions generally are not to be exemplified or allowed, nor is the Exemplification of a *Will* under the Great Seal. *Ibm.*

Exemplification of Letters Patent, of a Grant of Fee-Farm Rents, was produced, but so far only as concerned this Grant, and held good in *Carth.* 209. Yet in *Chancery Pre.* 59. the Exemplification of *part* of a Patent was not allowed to be read in Evidence (notwithstanding the Statute 3 & 4 *E.* 6. and 13 *Eliz.*) in a Case where the other Side have not Time to consult the Patent Roll, and so may be surprised by an imperfect Exemplification. *Ibm.* 116.

To prove the Delivery of Goods to a Master of a Ship, an Exemplification of the *Entry* thereof was offered in Evidence, which Entry was made in the Custom-House Books at *Rotterdam*, attested by a public Notary, and sealed with the public Seal there; but the Court would not permit the Exemplification to be given in Evidence. *Ibm.* 117.

17. *Hand-writing.*

In Debt upon a single Bill, upon *non est Factum* pleaded, one subscribing Witness gave full Evidence of the Sealing and Delivery; the other Side produced a Witness of the same Name and Surname with the other subscribing Witness, who acknowledged that the Hand was very like his, but that it was *not his Hand*; and that he *never knew either of the Parties, nor the other Witness*, neither could the other Witness say that *he was the Man*, and both their Reputations being proved good, Holt Ch. J. ordered both to write their Names, which they did, and left it to the Jury, who found for the Plaintiff. *Ibm.* 133.

In the Trial of the seven Bishops, Powel J. declared, in the proving of Lord Chichester's Hand, that in *civil Actions* a slender Proof was sufficient to make out a Man's Hand, as by Letter, or the like; but in *criminal Cases*, the Proof ought to be *positive and substantial*, not by Belief; but the Court was divided. *Ibm.* 222.

Where there are two Witnesses to a Deed, who are dead, if there be *full* Evidence to prove *one* of their Hands, and *any* Evidence that Endeavours have been used to find one to prove the other's Hand, this is sufficient, for perhaps the Witness was a Stranger. *Ibm.* 223.

To prove a Hand-writing by *similitude*, and by those who have known the Hand, though the Party was not seen to write it, in *Sidney's Case* was allowed sufficient Proof of a treasonable Writing; for it is as much Proof as the Thing is capable of; though *Sidney* said, it had been declared,

declared in *Lady Carr's Case*, to be no lawful Evidence in *criminal Cases*. *Ibm.*

In *Crosby's Case*, *Comparison of Hands* was held not to be good Evidence in Treason, unless the Papers are found in the Custody of the Person himself, and not of another; nor is it sufficient for the original Foundation of an Attainder, but if the Fact be otherwise proved, it may be well used as *circumstantial Evidence*; but to *conviction* *similitude* of Hands, is to run into the *Error of Sidney's Case*. *Ibm.*

In Debt upon Bond, and *non est Factum* pleaded, a Witness swore his Hand was subscribed as a Witness, but did not see the Obligation sealed and delivered, and that he never set his Hand as a Witness but where he saw the Sealing and Delivery; upon this, one was sworn to prove the Hand-writing of the other Witness, who was dead, which was opposed; but *Holt Ch. Justice* said, a Man shall not lose his Obligation because they have tampered with his Witness, and he allowed the Plaintiff to prove his Obligation by *Comparison* of the Hand of the other Witness. *Ibm.*

A Deed at *Warwick Assizes* 1699 was produced, to which there were two Witnesses, one of whom was blind; and by *Holt Ch. J.* the Deed was admitted to be proved by the other Witness, and read, or it might be proved without proving the Death of the *blind* Witness, or even having of him at the Trial, proving only his Hand; and so it was done here. *Ibm.*

Debt on Bond by G. as *Executor* of C. against N. which C. happened to be the only surviving subscribing Witness, whose Subscription was proved by *Parity of Hands*, and, by *Parker Ch. J.* G. being disabled by proving the Will,

Will, is, as if there was *no Witness*, where *Parity of Hands* may be allowed: So in Case of Depositions in *Chancery* taken *before* any *Interest* accrues to the subscribing Witness, &c. *after* he had made his Subscription, this may be proved by *Parity of Hands*. *Ibm.*

Where a Witness would swear to the Hand-writing of another, he must be able to say, he has *seen him write*, unless where there hath been any fixed Correspondence by *Letters*, and that it can be made out that the Party writing such Letters, is the same Person who attested the Deed, and then that will be sufficient. *Ibm.* 224.

Case on a Promissory Note for 10*l.* attested by two Witnesses, one of them said his Name was *very like* his Hand, but he never saw the Note executed, for he remembered the Time when he was called in to witness some Writings, there were only *two half Sheets stamped*, but no such Paper as the Note was attested by him; the *other Witness* said the same; upon which the Plaintiff produced the two half Sheets, and the Witnesses swore to the Execution of them: Whereupon *Pratt Ch. J.* left it to the Jury, on the *Similitude* of Hands between the Deeds proved and the Note, and the Jury found for the Plaintiff. *Ibm.*

Two Witnesses to a Bond, *one* mad, and in *Bedlam*, and the *other* in *Africa*; on an Order to prove an Exhibit *vivâ voce in Chancery*, a Witness proved this Fact, and their Hands to the Bond, *as if dead*: But if both Witnesses are *beyond Sea*, proving the Hand of the Party is *not sufficient*; it is usual only to prove the Hand of one of the Witnesses, and that *they are beyond Sea*. *Ibm.*

18. *Inquest of Office.*

An *Inquest of Office* is no conclusive Evidence; nor is an Inquisition, where there is no *Commission* to warrant it, unless in the Case of an old Inquisition *post mortem*, which may be read as Evidence, without producing the Commission. *Vin. Evid.* 120, 121.

19. *Inrolment of Deeds.*

Inrolment of a Deed, which needs no Inrollment, is no Evidence: Where the *Estate* passes by the *Inrollment*, as by Bargain and Sale, there it is Evidence; but where it is only for *safe Custody*, there it is *not*, otherwise than against the Party who sealed it, and all claiming under him, and so far it shall. *Ibm.* 121.

See 10 *An. c.* 18. how to make the Inrolment Evidence.

20. *Inspeximus.*

It is said an *Inspeximus* of a Deed inrolled in Chancery, is not to be shewn in Evidence, unless it be a *Bargain and Sale* inrolled there; for if it be a Deed of Feoffment, the Deed itself must be produced, for the *Inspeximus* is no Matter of Record: But, by *Rolle* Ch. J. though it be the *Inspeximus* of the Inrolment, and not of the *Deed itself*, yet if it be of an *antient Deed*, it may be given in Evidence. *Ibm.*

In Ejectment at the Bar, the Defendant gave in Evidence an *Inspeximus* of a *Lease* made by the Abbot of B. which the Court disallowed, being a *private Deed*, and may be forged, and

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an *Inspeximus* lies only of Matter of Record; whereupon they shewed an *Allowance* of the same Deed in the Court of Augmentations, which *per Curiam* is good against the King. *Ibm.*

A *Constat* or *Inspeximus* of Letters Patent, made since 27 H. 8. may be pleaded by the King's Patentees, or any claiming under them, as well against the King as any other. *Ibm.* 122.

21. *Journal.*

Journal of the House of Commons is no Evidence, for they have no Power to give an *Oath*: But the *Journal* of the House of Lords was proved, and admitted in the Bishops Trial to prove the King's Speech 1662. and the Opinion of the House of Lords about the King's Power in Ecclesiastical Affairs. *Ibm.* 122.

22. *Libels.*

The finding two or three Copies of a *Libel* in a Person's Chamber, without discoursing of it, or delivering of it out, is no Publication. *Per Cur.* *Ibm.* 228.

Depositions before a Justice of Peace, the Deponent being dead, is Evidence only in *Felony*, but not in an Information for a *Libel* against the Government. *Ibm.*

If a *Libel* be made in Writing, and afterwards burnt and one remembers the Contents, and dictates to another, who writes it, the Writer is Maker of a *Libel*: He who takes a Copy of a *Libel* in Writing, though he be not the Author, is guilty of making a *Libel*; *per Holt* Ch. J. *Ibm.* See 2 *Salk.* 417. good Matter on this Distinction.

Printing

Printing a Libel is a Publication; and if a Man is not able to give an Account how he came by it, it makes him the Printer, and of Consequence the Publisher; so the Delivery by a Printer to S. is a Publication by the Printer, and the *Receiver is an Actor* in that Publication, if he doth not forthwith carry it to a Magistrate: If a *Libellous Paper* be found in a Man's Custody, as upon a Shelf in one's House or Shop (which was the present Case) it shall be thought he printed it, unless he can give a good Account how he came by it, to excuse himself; *per Parker Ch. J. Hill. Vac. 3 Geo. at Guildhall. Rex and Straban*, who was a Bookseller, and found Guilty. *Ibm.* 229.

23. Marriage, and Marriage Agreement.

Constant Reputation shall be allowed Proof of *Marriage and Orders*; *per Holt Ch. J. Ib.* 235.

What can be a greater Evidence in a Court of Law, to shew there was *no Marriage*, than a *Sentence in the Spiritual Court*, by a regular Suit, and pronounced in the Life-time of the Parties, that they were guilty of Fornication, and Proof of the commutation Money by the supposed Father. *Ibm.* 129, 235.

For the Proof of a Marriage, was given in Evidence *Cobabitation for twenty Years*; that they came to Town, and lodged in Town; that the Husband was a Papist, and they were married by a Papist, to wit, the *Portugal Ambassador's Chaplain*, for which Reason no other Person was present: That the Husband in his Life-time *acknowledged her his Wife*, and desired the Witnesses to use her *as such*; and that a little before

before, and on the Day of his Death, *declared* in the Presence of his Physician, and several other Witnesses, that he was *married* to her. *Ibm.* And it was so found.

A. and M. were married at the Fleet by different Names, and an Entry made in the Register there, of the Marriage on such a Day, by *their different Names*; in the *Spiritual Court* this was sentenced a *good Marriage*, and that Sentence *affirmed* in the Delegates: Now on a Trial at Bar between a Daughter of that Marriage, and a Daughter of a former Marriage; *the Father being dead*, it was found a Marriage. *Ibm.*

A Marriage was not allowed on a Trial, it being *signified* to the Court, that a *Sentence* in the Arches had been given, that there was no *Marriage*, and the Temporal Courts must give Credit thereto, till it is reversed, for it is a Matter of meer spiritual Cognisance. *Ibm.* 236.

In Debt upon an Obligation, *Coke Ch. J.* said, and that so was the Opinion of the *Civilians*, that a *Disagreement* to a Marriage had *under Age* of Consent, ought *at Age* to be *published in Court*, otherwise the Issue may be *bastardized*; for a *Disagreement in Writing* is not sufficient, nor a good Proof. *Ibm.*

In *Assumpsit* on a *Contract to marry*, any *lawful Impediment* may be given in Evidence; as that the Parties were within the *Levitical Degrees*, &c. for this makes the Promise void; but it is otherwise of a *Præ-contract*. If such a Promise be not *in Writing*, the Defendant may give in Evidence the Statute 29 C. 2. c. 3. and if *the Woman's Promise* does not bind, the *Man's Promise* is but *nudum pactum*, the Promise therefore must be mutual. *Ibm.* Yet,

If there be an *express Promise* of the Marriage by the *Man*, and the *Woman* countenance it, and by her Actions behaves herself so as if she agreed to the Marriage, though there be no *actual Promise*, yet this shall be sufficient Evidence of a Promise on the *Woman's Side*. *Ibm.*

24. Notary Public, Certificate.

It was resolved that a *Copy* of an Agreement *registred* in *Holland*, and attested by a *Public Notary* there, may be given in Evidence for the Defendant, as he proved that the Plaintiff took out another *Copy* of the same Agreement, but would not now produce it; for it is plain he knew of the Agreement, and could not be surpris'd. *Ibm.* 123.

And in the above Case the *Court held*, that a Plaintiff who was in *Holland* might make *Affidavit there*, and get it attested by a *Public Notary*, and that it should be sufficient Evidence to hold the Defendant *here* to Special Bail. *Ibm.*

25. Perjury.

Exception was taken to a Witness, that he was *convict* of Perjury, and a *Copy* of a *Verdict* in *Oliver's Time*, on which there was *no Judgment*, was offered; but the Court would not admit the Evidence, because, by the Alteration of Government, all was discontinued; but it was agreed, that Evidence *vivâ voce* might be given to prove him perjured: The other Side, to establish the Witness's Credit, produced a *Pardon* of the Perjury; but *per Cur.* this will not do, for it cannot restore him to his Credit. *Ibm.* 244.

A false

A false Oath any Way conducive to the *Matter in Issue*, or a guide to the Jury, though *only circumstantial*, it is Perjury; so if it tend to the *Discovery of Truth*, though but a *Circumstance*, it is Perjury; but to tell an *impertinent Tale*, nothing to the Purpose, is not so. *Ibm.* Yet if a Man speak to the *Credit* of a Witness, *not* directly to the Issue; if his Evidence be false it is Perjury.

As at a Trial the Question was *upon Money lent*, and it being objected that it was *improbable*, that the Plaintiff who was a cautious Man should lend such a Sum *without a Note*, a Witness was produced to prove that he had lent a *greater Sum* to a Person *then in Court* without a Note, *which Person swore he did not*: And upon Motion to file an Information of Perjury against him for the Oath, the Court held it reasonable. *Ibm.*

To convict a Man of Perjury a *probable* Evidence is not enough, the Evidence must be *strong and clear*, and more *numerous* than the Evidence for the Defendant; it is otherwise only Oath against Oath. *Ibm.*

A Person swore he saw and read such a *Deed*, and it proved on the Trial to be only the *Counterpart* which he saw, this is no other than a Mistake, but no Perjury. *Ibm.*

Perjury may be committed in *circumstantial* Matter, but the Circumstance must be *very material*, and of that weight, that without it, there is no Hope to find Credit with the Jury *Ibm.*

26. *Presumption.*

Presumptions are of three Sorts, *Violent*, *Probable* and *Light*; *Violent* is many Times *plena Probatio*, a full Proof, the *Probable* moveth little; and the *Light* not at all. *Ibm.* 124.

If a Deed of *Feoffment*, of forty Years standing, be given in Evidence, and *Possession* hath always gone along with it; *per Coke* Ch. J. *Livery* shall be intended, though it cannot be proved; but if the Jury find all the Matter *pecially*, the Court cannot adjudge it a good *Feoffment* without *Livery*; and though a Jury may find a Thing upon *Presumption*, yet the Court ought to judge upon what appears upon Record. *Ibm.* 125.

In Things of great *Antiquity* *Omnia præsumuntur solenniter esse acta.* *Ibm.* 125. See 12 Rep. 3, 4.

After long *Possession*, as for twenty-five Years, *Livery* and *Seisin* shall be presumed, for it is as much favoured in *Law* as in *Equity.* *Ibm.* 126.

After a great length of Time, as forty Years *Possession* of a Copyhold, under a Will, a *Surrender* to the Use of a Will shall be presumed and supplied; for they are kept by the Lord and his Stewards, who are often changed, and generally negligent, and Surrenders may be lost without the Default or Negligence of the Party. *Ibm.*

Length of Time is only a *Presumption* of Payment, and there is a Difference between *Debts* and *Legacies*, as to their Antiquity. *Legacies* always appear upon the Face of the Will, and so an Executor knows what he hath to pay, without request; but for *Debts* and other dor-

mant

mant Demands against which the Executor cannot provide without Notice, the Statute had Reason to limit the Time. *Ibm.*

Where *two Facts* are alledged against the *same Man*, and it be questioned whether it be the *same Man*, it is sufficient that it be so *reported*, unless another of the *same Name* be produced. *Ibm.*

27. *Priority of Birth.*

A Man had *eight Sons*, the *three last* were all born at a *Birth*; and in Ejectment (the *five eldest* being all dead without Issue) the Question was, which of the *three* was *eldest*? They were baptized by the Names of *Stephanus*, *Fortunatus*, and *Achicus*. Declarations of the *Father* were proved, that *Achicus* was the *Youngest*, and that he took the Names from *St. Paul* in his *Epistles*: The Son of *Fortunatus* was Lessor of the Plaintiff; *et è con.* it was proved from the Declarations of one *M. F.* who was a *Relation*, and at the *Birth*, that upon the Birth of the *second Child*, she took a String and tied it round the Arm to know one from the other, &c. Objection was made, that the Declaration of *this Woman* was *not Evidence*, in regard it was *since the Death* of the *fifth Son*, when there was a Discourse about this Matter; but what this Woman said soon *after the Birth* was allowed in Evidence, when there was no Prospect of a Controversy. *Ibm.* 247. *Per Reynolds, C. B.* at Lent Assizes Com. Devon 1731.

28. Probate.

Will proved under the *Seal of the Bishop* is only an Estoppel: And the *Probate* of a Will, where it respects *Lands*, is no Evidence at Common Law; nor is the *Examination* of Witnesses of the *Probate* to be made use of at Common Law. *Ibm.* 126.

At *Rygate, Surrey*, Summer Assizes, 10 *W.* 3. it was ruled by *Holt Ch. J.* upon the Evidence, that, because in the Spiritual Court after *Probate* of a Will, *six Months* are allowed to register it, and when it is registred, it is by the *Original*, but the Probate is signed by the Register only, upon the *Attestation and Examination* of the *Proctor*, a Will therefore proved in 1666, in the Archdeacon's Court of *London*, and the Office in the Fire of *London* was burnt soon after, and the *Probate* produced in Evidence to prove the Will with all these Circumstances; it was denied by *Holt Ch. J.* to be good Evidence to prove the Will. *Ibm.* 127.

In the Case of *Lady Jones and Lord Say and Seal*, *M.* 2 *G.* 2. *Canc.* Though the Will was made in 1685. the Court would not allow the *Probate* to be read, it being only in Nature of a Copy, and unless the *Original be lost* cannot be read as to *Lands*. *Nota*; The Will in a former Cause was proved, and an Order obtained for reading the Depositions in that Cause, but the Will produced not being marked by the Examiner as an Exhibit, Objection was therefore made to its being read, but the Will being set forth in *his Verbis* in the Interrogatory, and being examined in Court with it, the Will was ordered to be read, but it was agreed it could not be read out of the Interrogatory, because
that

that is no more than a *Copy*, and only Evidence when the Original is *lost*. And King Chancellor examined the Officer who produced the Will where he had it, though no Order was in the Cause to examine *viva voce*. *Ibm.* See *Ibm.* 259, 260.

29. *Record.*

When the Party makes a Title *by Record*, he must shew it under the Great Seal, unless it be in the same Court, for a Man in Pleading cannot make to himself a Title in any Case *by Record*, without so shewing of it. *Ibm.* 130.

A Deed of Uses was *lost*, and to supply it, Evidence was given that it had been formerly produced in Evidence in the *Exchequer*, upon an Alienation there questioned, and the *Record* thereof was shewed; and this was allowed for Evidence. *Ibm.* 131.

No particular Crime shall be proved against a Witness, unless the *Record* of his Conviction be produced. *Ibm.*

30. *Reputation.* See *Marriage.*

The Judges shall construe Words as they are intended and understood in the *Places* where the *Land* demanded lies. *Ibm.* 132.

Usage may expound antient Charters where the *Words* are *obscure and obsolete*, and may bear several Senses; but *contra* where the Charter is of modern date. The *Reputation* and Declaration of People may be given in Evidence to explain *old Words*, in a Conveyance; in the Description of an Estate or Lands, no Witnesses shall be asked how the Defendant stands affected, where the King is Party; but if the

Defendant gives Evidence of a *general Reputation*, it may be answered for the King by *particular Instances*. *Ibm.* 132. *Vide Ibid.* 249.

31. Rule of Court.

It was ruled by *Treby* Ch. J. at *Guildhall*, P. 10 W. 3. That at a Trial at *Nisi Prius*, a Rule of Court, produced under the Hand of the *proper Officer*, is in itself an Original, and there is no need to prove it a true Copy. *Ibm.* 132.

32. Seals.

The Seal of *Brecknock* is Evidence; so is that of *Chester*. And the Courts at *Westminster* ought to take Notice of the Seal of the *Grand Sessions* in *Wales*, their Authority being by Act of Parliament, and the Profits of those Seals are appointed to be paid into the Court of Exchequer; and by *Moreton* Serjeant, he never knew the Seal of *any Court* denied in Evidence. *Ibm.*

33. Sentence in the Exchequer.

Upon a *Seizure* of Goods, as Brandy, &c. if the *Property* be once *determined* in the Exchequer upon an Information, &c. and the Defendant *acquitted*, the Trial shall not afterwards be drawn over again in *another Action*. So if Goods be *condemned*, the Party is bound by it, and shall not have Liberty afterwards to contest this in a *collateral Action*. *Ibm.* 133.

*Of Evidence by Records, (a) Books, Deeds,
and other Writings.*

If the Issue be a Recognizance or not, a Recognizance with a Defeazance is good Evidence. *Plo.* 14. So of an Agreement, a special Agreement will prove it. *Plo.* 8.

A Licence to alien Land, or a Pardon for Alienation of Land, was held by a common Presumption, to be a good Proof that the Land was held *in Capite*.

Ancient Deeds may be given in Evidence, although the Execution of them cannot be proved. *1 Keb. 877: Ancient Deeds.*

Where there are two Witnesses to a Deed, who are dead, if there be full Evidence to prove one of their Hands, and that there have been Endeavours to find out Proof of the other's Hand, it is sufficient. *Comberbatch* 248.

He that takes out a Copy of Part of a Record, must at least take out so much as concerns the Matter in Question, or else the Court will not permit it to be read. *Copy of a Record.*

(a) The bare producing the *Posse* is no Evidence of the Verdict, without shewing a Copy of the final Judgment.

(b) Because it may happen, that the Judgment was arrested, or a new Trial granted. But it is good Evidence, that a Trial was had between the same Parties, so as to introduce an Account of what a Witness swore at that Trial, who is since dead. *Per Pratt Ch. J. 1 Str. 162.*

(b) Not enough to give in Evidence a Copy of a Judgment, though it be indorsed to have been examined by the Clerk of the Treasury, because it is not Part of the necessary Office of such Clerk, for he is only intrusted to keep the Records, for the Benefit of all Men's perusal, and not to make out Copies of them. *Gillb. Law of Evid. 25.*

To

Feoffment.

To prove a Feoffment, a Deed of Feoffment is shewed, but no Livery is indorsed, if Possession has gone with the Deed, it is good Evidence. *Roll. Rep.* 1 Part 132.

Proviso.

Upon Not guilty to an Information upon a penal Law, a Proviso to excuse him may be given in Evidence. *Jones Rep.* 38.

Non decimando.

If a Man prescribe in a *Non decimando* generally, he cannot give a Bull in Evidence. *Palmer's Rep.* 38.

Deed.

A Deed with the Seals torn off was admitted to declare Uses. *Palmer's Rep.* 403, 405.

Upon Motion, a Rule was made by Consent, that a Deed should be allowed in Evidence at the Assizes without proving of it. *Vin. Abr. Tit. Evid.* 52. pl. 5. cites 1 *Sid.* 269. pl. 23. *Trin.* 17 *Car.* 2. *Anon.*

Records.

Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence; and so may any Thing done in the County-Court, Court-Baron, or Hundred-Court, &c. be proved by Witnesses.

A Copy of a Record being sworn to be a true one, shall be admitted to be given in Evidence, and no Rasure or Interlineation shall be intended. 10 *Coke* 92. *Layfield's Case.*

Where a Record is lost, a Copy of it may be read, without swearing a true Copy, for the Record is in Custody of the Law, and not of the Party, and therefore if lost, there ought to be no Injury arising to the Party's private Right, and consequently, if it be lost, the Copy must be admitted without swearing any Examination concerning it, since there is nothing with which the Copy can be compared, and

therefore

therefore it must be presumed true without Examination. *Gilb. Law of Evid. 22, 23.*

A Copy of a Conviction upon an Indictment of Trespass, &c. shall not be admitted Evidence singly by itself in an Action of Trespass, &c. but with Evidence it shall.

The Copy of the Decree of Tithes in *London* has been often given in Evidence, without proving it a true Copy, because the Original is lost. *1 Vent. 257. Gilb. L. of Evid. 23.*

So a Recovery of Lands in antient Demeſne was given in Evidence, where the Original was lost, and Possession had gone a long Time according to the Recovery. *1 Vent. 257. Gilb. L. of Evid. 23.*

A Fine, or Common Recovery, may be given Fine. in Evidence, though it be not under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the Part indented is the usual Evidence that there is such a Fine, though they which saw the Fine are also good Evidence. *Plow. 410. Style 22.*

The Chirograph of a Fine is Evidence to all Persons of such a Fine, for the Chirographer is appointed to give out Copies between the Parties of those Agreements that are lodged of Record, and therefore his Copy must be admitted as Evidence without further dispute. *Trin. Affizes 1701. Gilb. L. of Evid. 24.* But where the Fine with Proclamations is to be a Bar to a Stranger, there the Proclamations must be examined from the Roll, for the Chirographer is authorized by the Common Law to make out Copies to the Parties of the Fine itself; yet is not appointed by the Statute to copy the Proclamations, and therefore his indorsement upon the

the Back of the Fine is not binding. *Gilb. L. of Evid.* 26.

When a Writ out of a Court of Record is only Inducement to an Action, the taking out the Writ may be proved without a Copy of it; for it is not of Record 'till it be returned. And so I think it may, to prove the Point in Action, by Witnesses, or Notes of it in a Book of Entries, &c.

Bevis against Holloway.

Summer Assizes 1683, In Debt upon an Escape upon a Judgment, and *Ca. sa.* in the Court of the Dean and Chapter of *Peterborough*, being an inferior Court of Pleas, the Plaintiff was nonsuited, because he had not a Copy of the Plaint or Judgment, but only the short Notes of the Book of the Court. *Aliter* in Court-Baron, &c.

Cafe for rescuing a Distress, and declared, that he was seised in Fee, and demised the Premises to *J. S.* for a Year, and so from Year to Year, as long as both Parties should please, rendering Rent; and for Rent arrear he distrained, and the Defendant rescued; and on Evidence it appeared, that the Demise was for a Year certain, and so from Year to Year, and that the Lessee should not go away without giving a Quarter's Warning; and *per Holt, C. J.* held no Variance, for that the Quarter's Warning was only collateral. *6 Mod.* 215.

Lease.

So if a Lease be pleaded, a Lease upon Condition is good Evidence, *1 H.* 8. 20. because the *Genus* comprehends the *Species*. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence. *44 E.* 3. 39. A special Agreement is Evidence of an Agreement. *Plow.* 8.

Pope brings his Replevin against *Skinner*, who avows as a Commoner, because the Beasts were Damage-feasant in the Common. The Plaintiff pleads in Bar, that *W.* was seized in Fee of an House and Land, &c. whereunto he had Common, &c. and demised the same to Plaintiff on 30th of *March* 11 *Jac.* to hold from *Lady-day* next before for one Year; the Avowant traversed the Lease *Modo & forma*, and the Jury found that *W.* made the Lease to Plaintiff on 25th *March* for one Year from thence next ensuing; and held the Plaintiff should recover; for though this be not the same Lease, yet the Substance of the Issue is, whether Plaintiff had such a Lease as would intitle him to Common, and that he had, and the *Modo & forma* as to the rest is not material. *Hob.* 72. *Pope v. Skinner.*

But if a Feoffment be pleaded in Fee, upon Feoffment. Issue *non feoffavit modo & forma*, a Feoffment upon Condition is no Evidence, because it doth not answer the Issue; and wheresoever Evidence is contrary to the Issue, and doth not maintain it, the Evidence is not good. 11 *H.* 4. 3. *Feoffments* 41. A Grant in Reversion is no Evidence, but a Lease and Release is, 20 *H.* 7. 5. If the Indorsement be of a Livery by Attorney, the Letter of Attorney must be shewed.

To prove the Sealing and Delivery of a Deed, and not know the Party that did it, is not good Evidence; but if he knows the Party upon Sight of him, it is good enough. *Keilw.* 59.

A Shop-Book no Evidence after a Year. *Stat. Shop-Books.* 7 *Jac.* cap. 12.

The

The Plaintiff being a Brewer, brought an Action against the Earl of Torrington for Beer sold and delivered; and the Evidence given to charge the Defendant was, that the usual Way of the Plaintiff's dealing was, that the Draymen came every Night to the Clerk of the Brew-house, and gave him an Account of the Beer they had delivered out, which he set down in a Book kept for that Purpose, to which the Draymen set their Hands, and that the Drayman was dead, but that this was his Hand set to the Book; and this was held good Evidence of a Delivery; *otherwise of the Shop Book of itself singly, without more.* T. 2 Ann. Price v. Earl of Torrington, before Holt C. J. at Nisi prius at Guild-Hall, Salk. 285. Holt 300. S. C.

Indebitatus Assumpsit on a Taylor's Bill; at the Trial before Holt, and by Holt Ch. J. a Shop-Book was allowed for Evidence, it being proved that the Servant that writ the Book was dead, and this was his Hand; and he accustomed to make the Entries; and no Proof was required of the Delivery of the Goods; and the Chief Justice said, it was as good Evidence as the Proof of a Witness's Hand to an Obligation; he held, that though the Statute 7 Jac. 1. c. 12. says, a Shop-Book shall not be Evidence after the Year, yet that it is not of itself Evidence within the Year. Salk. 690. *Ld. Raym.* 732, 733. S. C. held accordingly.

Scrivener's Book to prove a Consideration paid (as a Tradesman's Book) is no Evidence for himself, but for any other it is: So a Tradesman's Book after his death. We have allowed a Burser's Book of a College for Evidence. *Per Holt, E. 6 W. 3 in B. R. Smart v. Williams. Cumb. 249. E. 6 W. & M. B. R. Per Holt Ch.*

Ch. J. The Book of a Man that keeps regular Entries, might be Evidence for him. *M. 7 W.*

3. *B. R. Blackeler v. Crofts, Cumb. 249.*

Shop-Books have sometimes been allowed to be read as Evidence at the Hearing, and sometimes rejected. *Totb. 91. Cary's Rep. 45.*

Upon Issue Assets or no Assets, or seized or not seized, if one give a Feoffment, &c. in Evidence, Covin may be given in Evidence by the other, but not if the Issue be infeoffed or not infeoffed; for it is a Feoffment *tiel quel*, though made by Covin. *Lib. 5. 60. Hob. 72.*

A voluntary Conveyance is not fraudulent because voluntary, but 'tis Evidence of Fraud against an after Purchaser *bona fide*; the Statute avoids such Deeds as are not *bona fide* and on Consideration, if made *ea intentione* to defraud Purchasers; therefore this Fraud must be found by the Jury. *Keb. 1 Part 486.*

The Book of Domesday brought in Court, is good Evidence to prove the Land to be Ancient Demesne. *Hob. 188.*

Copies of the Court-Rolls are the only Evidence for Copyholders, for (as *Littleton, Sect. 75.* tells you) they are called Tenants by Copy of Court-Rolls, because they have no other Evidence, concerning their Tenements, but only the Copies of Court-Rolls. But *Coke* explains the Text, and says, This is to be understood of Evidences of Alienation; for a Release of a Right by Deed, a Copyholder (that cometh in by Way of Admittance) may have, and that is sufficient to extinguish the Right of the Copyholder, which he that maketh the Release had.

Court-Rolls for Copyholders Recoveries are some Evidence, that the Manor bears an Intail of a Copyhold, but to shew that Remainders (after an Estate Tail spent) to be enjoyed, is a better.

Statutes.

Pardons.

General Acts of Parliament may be given in Evidence, and need not be pleaded; and so may general Pardons given by Parliament, if they be without Exceptions; but commonly Advantage of the Act is given by the Act itself to the Offender, without pleading it; as by the late (most truly so called) general Act of Indemnity, every Person thereby pardoned, may plead the General Issue, and give the Act in Evidence, for his Discharge: Which are *general*, and which *particular* Statutes, see *Lib. 4. 76.*

A private Act may be given in Evidence exemplified under the Great Seal, or a Copy of the Record; but a printed Copy is no Evidence unless it be proved; it ought to be pleaded, but the Jury may find it. *Dyer 239.*

Case on a Wager concerning the Day of the Conclusion of the Peace; and to prove it to be on the 10th *September*, the printed Proclamation was produced; it was objected, that it ought to have been examined by the Record inrolled; but *Holt C. J.* held it good Evidence; and that such Things as these are of as publick a Nature, as publick Acts of Parliament: And that even a private Act of Parliament in Print that concerns a whole County, may be given in Evidence without comparing it with the Record. *Reports in Holt's Time 296. Cases W. 3. 215.*

Inspection of a Deed inrolled may be given in Evidence; *Contr.* of a bare Deed not inrolled, or of a Deed that needs no Inrolment. *Pasch. 1655. B. R. Goodson's Case, Style 445.*

An

An *Inspeximus* lieth only of Matter of Record, and not of a private Deed. *Keb.* 2 Part 294.

A Deed to lead the Uses of a Fine was inrolled on the Acknowledgment of but one of the Parties to it, and was allowed by *Glyn* Chief Justice in Evidence, as *Rolle* Chief Justice had done before him, tho' no binding Evidence. *Turbet* vers. *Maddison*, *Pas.* 1655. *B. R.* *Style* 462.

An Office found at a Death, &c. may be given in Evidence.

A Verdict against one, under whom either Plaintiff or Defendant claims, may be given in Evidence against the Party so claiming. *Contra* if neither claim under it. *Duke* and *Ventres*, *Mich.* 1656. *B. R.*

If a Man has Title to several Lands held by several Tenants, and recovers in Ejectment against one, that Recovery shall not be read in Evidence against the rest. 3 *Mod.* 141. *Loch* v. *Norborn*.

If an Action be brought on a Statute, which has several Provisoos in it, the Defendant may plead Not guilty, and aid himself by any of the Provisoos in Evidence; but if the *Provisoos* be made to that Statute, in another Statute of which the Defendant may take Advantage, he ought to plead it, and not give it in Evidence. *Per Rolle* Chief Justice, *Mich.* 1650. *B. R.* *Jones* 320. *Accord.*

Arrest and Imprisonment to prove a Bank- Bankrupt. ruptcy must be proved by Record. *Newby* versus *Bathurst*, *Pasch.* 1659. *B. R.* In a Trial at Bar, what Evidence proves a Bankrupt. See *Keb.* 2 Part 487.

Of Evidence by Records, Books, Ch. 15.

Records, as Patents, Statutes, Judgments may be given in Evidence. *Hob. 227. contr. to Dyer 129.*

To prove an Extent upon a Statute or Judgment, you must prove a Copy of the Statute and Judgment, as well as the Copy of the Writ and Extent.

When Records are pleaded, they must be *sub pede Sigilli*; *contr.* if given in Evidence. *Style 22. White's Case.*

A Copy of a Deed is good Evidence where the Defendant has the Deed, and will not produce it. *Per Vernon Justice, Clayton 15.*

So, that there was a Revocation is sufficient for the Heir, without shewing the Deed itself, which was taken away by the Defendant; so that the Witnesses to the Release proved the Lease without shewing, being taken away by the other Side.

A Deed of Feoffment without Livery may be given in Evidence as a Release. *Per Berkeley, 11 Car. Clayton 32.*

If a Fine be given in Evidence, with five Years Non-claim, &c. the Fine must be shewed with the Proclamations under Seal, and the Chirograph will not serve.

A Deed cancelled by Practice or Fraud, was allowed to be read in Evidence in an Action under that Deed, the Practice being proved. *Hetley 138.*

Against a Purchaser *bona fide*, Recital in a Deed of Money paid is not sufficient, nor Acquittance for the Money, unless it be of ancient standing, and then it shall be presumed.

The

The Deed to lead the Uses of a Fine *sur concessit*, need not be proved *per Testes*.

If a Deed of Feoffment be shewn, but no Livery, Possession going with the Deed, is Evidence to a Jury to find Livery.

At *Guildball, Trin. 23 Car. 2.* *Hale* Chief Justice cited the Case of *Sir Paul Pindar. A Levary, &c.* was proved by a Recital of it in another Record, and *Hale* and *Mainard* demurred on the Evidence; and adjudged against them for this Cause, *viz.* That it was proved there was such a Record; that it was filed; that it was taken off the File. But (by him) generally without such Proof, the Evidence is not good, because one Record may recite one that never was.

Recital of other Grants by Letters Patent Recital in Letters Patent, is some Evidence, but not Letters Patent fit to be allowed, without shewing the former Letters Patents, or a Copy. But the Jury may find them. *2 Rolle 673. pl. 2. 2 Lev. 108.*

The Proof of this Surmise in any Court of Surrender. Record, shall not be given in Evidence in another Action upon the same Custom, because the Defendant in the Prohibition cannot cross-examine.

The Record of Conviction of Recusance being burnt, may be proved by the Roll of Estreats of the Clerk of Assize, signed by the Judge and delivered into the Pipe, or by other Evidence, as a *Fieri facias, &c.* may be proved by other Evidence. Recusant.
Hard. 523.
Knight ver.
Dowler.

If the Issue be whether the King's Tenant by Surrender. Letters Patent surrendered to the King or not, the accepting of new Letters Patent, which is a Surrender in Law, is good Evidence.

Dures.

If an Imprisonment by *Dures* at *D.* be in Issue, 'tis not material whether he was ever at *D.* or not, for the Effect of the Issue is, if the Deed was made by *Dures*.

Feoffment.

So if a Feoffment pleaded by Deed, a Feoffment without Deed, or another Deed, is good, for the Effect of the Issue is upon the Feoffment, not upon the *Fait*.

*Non demisit
modo & forma.*
Dyet 116.
2 Rolls 682.
pl. 6.

If in pleading an Indenture of Demise you mistake the Recital, and the Issue is *Non dimisit modo & forma*, the Mistake shall not hurt, for the Effect of the Issue is upon the Demise.

If the Date or Number of Years be mistaken, 'tis fatal.

Upon *Non habuit seu tenuit ad firmam contra formam Statuti*, The Parson may say he took the Farm for Maintenance of his House, according to the Proviso in Debt upon the Statute of 21 *H.* 8.

But upon the Statute of 5 *E.* 6. for ingrossing, upon Not guilty 'tis said, That the Defendant cannot give in Evidence a Licence according to the Proviso of the Statute; *sed quære rationem*.

Seisin. Feoffment.

In a *Scire facias* against Tertenants, and a Feoffment pleaded before the Judgment, *absque hoc*, that he was seised *tempore Judicii*, and Issue upon the Seisin, that the Feoffment was fraudulent, to defraud the Judgment, may be given in Evidence; but otherwise, if the Issue had been upon the Feoffment.

Copy of Records.
Clayton 142.
Nelthorp v.
Johnson.

A Copy of Part of a Record cannot be given in Evidence, unless 'tis proved, that the Part shewed in Evidence, is all concerning the Matter in Question.

A Transcript

A Transcript of a Record or Enrolment of Transcript..
 a Deed may be given in Evidence, for they are Enrolment.
 Things to be credited, being made by Officers
 of Trust.

Where a Deed is inrolled (by the proper Officer) the Indorsement of that Enrolment is Evidence, without further Proof of the Deed.
Gilb. L. of Evid. 24.

If one produce a Lease made upon an Outlawry, to prove a Title, he must also produce an Outlawry.
 the Outlawry itself; but if it be to prove other Matter, he needs not shew the Outlawry.
 And so it is of an Extent, without shewing the Statute or Judgment on which the Extent is grounded.

By *Rolle*, an Office found after the Death Office.
 of a Tenant *in Capite* of Lands in another County, may be given in Evidence to try the Title of those Lands, if there was a special Livery granted unto the Heir.

The Copy of a private Act of Parliament may be given in Evidence; and if upon a Col-
 lateral Issue it is to be proved, that such a one was Justice of the Peace, or Baronet, &c. Common Reputation is sufficient Proof, without shewing the Commission, or Letters Patent of the Creation.

Style 462.
 Mich. 1650.
Coram Roll.
ad Guildhall.
Littleton ver.
 Poins.
 Private Act.
 Just. of Peace.

A Copy of a Record is not true, unless it be transcribed in the same Language, and therefore a Translation shall not be given in Evidence; as where the Record is in *Latin*, and the Copy in *English*.

Record.
 Lawrence
versus Key.

A Copy of Copyhold Lands may be given in Evidence, whether the Rolls are lost, or not lost. *Mic.* 15 *Car.* 2 *B. R.* *Snow v. Cutler.*

Copyhold.
 1 *Keb.* 567.

If Copyhold Rolls make mention of a Surrender to the Use of the Tenant's last Will, and then admit *A.* as Devisee to the Will, this was ruled to be no Evidence of the Seisin, or Title of *A.* without the Will itself, because the Land doth not pass by the Surrender, without the Will itself, and therefore the Will must be shewn as the best Evidence of *A.*'s Possession and Title. *Gilb. L. of Evid.* cites *Jenkins* and *Baker*, per *Tracy*, 1705.

Copy of a
Recovery.

Exemplifica-
tion.

A Copy of a Recovery, after long Debate, suffered to be given in Evidence, the Recovery itself being burnt. And *Hale* said, the Exemplification of a Record under the Mayor of *Bristol*'s Hand was allowed for Evidence. 1 *Modern Rep.* 117. *Green* and *Proud*'s Case, 3 *Keb.* 310. *Hard.* 179.

In an Ejectment for Lands in *Brecknockshire* in *Wales*, the Defendant made Title by a Recovery of those Lands in a *Quod ei deforceat in Brecknock*, (which is their Writ of Right), and to make this out, produced an Exemplification of the Record under the Seal of the Grand Sessions in *Brecknockshire*. To this Evidence the Plaintiff demurred, and on great Debates in *Scac.* it was held, that this Exemplification was good Evidence; and Judgment for Defendant. *Hardres* 118. 2 *Siderf.* 145.

An Exemplification of a Recovery under the Seal of the Mayor of *Bristol*, was held good Evidence. *Whitehead*'s Case, tempore *Wild*, C. B. *Hardres* 179. 1 *Mod.* 117.

At a Trial at Bar in Ejectment, the Defendant setting up an Entail, the Plaintiff exhibited an Exemplification of a Recovery in the Marquis of *Winchester*'s Court in Ancient Demesne;

mesne; and held Evidence. 1 *Mod.* 117. *Green v. Proude.*

An Office before an Escheator shall not be given in Evidence, unless it be exemplified under the Great Seal of *England.* *Bro. Gen. Issue* 75.

On an old Recovery the Court allowed it, though no Tenant to the *Præcipe* could be proved, but it should be intended. 2 *Cro.* 455. *Mod. Rep.* 117.

When any Record is exemplified, the whole Record must be exemplified, for the Construction must be taken from the View of the whole Matter taken together. *Gilb. L. of Evid.* 17.

A private Act, that concerned *Rochester* Acts of Parliament. Bridge, though printed by *Rastal*, was not allowed in Evidence, not being examined by the Record. Otherwise of general Statutes, there the printed Book is good Evidence. *Lambart's Perambulation, Co. Rep.* and *F. N. B.* are good Evidence. 3 *Keb.* 91.

A Man's Book of accounts is no Evidence Book. for the Owner of the Book, but for the adverse Party; for his Book cannot be of better Credit than his Oath, which would not serve in his own Case. *Crouch and Drury, Pasc.* 13 *Car.* 2. *B. R.* 1 *Keb.* 27.

The Book of any Merchant is no good Proof; nor may be allowed touching any Debt due to him; but as to any Debt against himself it may be good enough: And this was agreed *per Cur'. Vin. Abr.* 91. *pl.* 20, 22.

If an Action be brought by a Shop-keeper, for Money due on Sale of Goods, we never enforce him to produce his Books; but if very slender Evidence be with him, then, if he will not produce his Books, it brings a great

Copy.
Deed.

Slur upon his Cause: *Per Cur.* M. 3 Ann. B. R. in Case of *Ward v. Apprice*, 6 Mod. 264.

A Copy of a Deed is good Evidence, where the Defendant has the Deed, and will not prove it. *Per Vernon*, Justice, *Clay. Rep.* 15. *Modern Rep.* 4. 266. 2 *Keb.* 483, 540. *Moor* 297.

It is dangerous to permit any one, who in Pleading ought to produce the Deed, on the General Issue, to give Evidence that *there was such a Deed*, by those that have seen and read it, or to prove the same by a Copy; but in great Extremity, when it appears the Deeds are burnt by a Fire, &c. it may be done. 10 *Coke* (*Layfield's Case*) 92.

The Plaintiff's Title in Ejectment was a Lease for 2000 Years; the Lease was lost, but Witnesses swore there was such a Lease, and that it was taken out of the Plaintiff's Trunk by Defendant and burnt; and held good Evidence. 2 *Keb.* 483.

The Defendant would have it presumed, that this Lease was revoked or surrendered, by shewing that the Defendant's Mother, who was seised in Fee, had made a Will and Settlements of the same Lands. But *per Cur.* A Revocation or Surrender shall not be intended without Proof. 2 *Keb.* 483.

In Ejectment, a Lease being recited in a Release, was admitted to be proved by the Witness to the Release, the Lease being imbezilled by the Lessor of the Plaintiff. 1 *Keb.* 12. *Negus v. Reynall*.

The Recital of a Lease in a Deed of Release, is good Evidence against the Releasor, and those that claim under him. 6 *Mod.* 44.

Copy

Copy of a Counterpart of a Lease, the Copy. Lease being lost, given in Evidence, and allowed. *Mich. 15 Car. 2 Stroud versus Dr. Holt, B. R.*

The Counterpart of an ancient Deed which is lost, is good Evidence with other Circumstances, but not of itself; but the Counterpart of a Deed to lead the Uses of a Fine, is good Evidence of itself. *6 Mod. 225.*

The Copy of a Deed burnt in a Fire, which the Witness made to carry to Council, but never examined with the Original, allowed to be read as Evidence. *2 Keb. 546. 1 Mod. 4.*

An Exemplification under the Great Seal of the Depositions of Witnesses who are dead, may be left to the Jury; but *contra*, where some of the Witnesses are still living. *2 Rolls Abr. 687. pl. 3. & 4.*

Several Depositions under the Great Seal are given in Evidence; the Jury may have them all with them, though they were not all read in Court. *Littleton's Rep. 69.*

Depositions taken in the Dutchy and exemplified, were refused to be read in Evidence, because the Defendant's Answer was not also exemplified. *Clayton 9.*

Though the Seals be broken off a Deed, yet Deed. the Deed may be given in Evidence. *Mod. Seals. Rep. 11.*

Defendant claimed by Patent to *Vanlore* in Patents. *22 Jac. tot, talia, tanta, &c.* as *Dyer*; the Duke of *Somerfet*, or Abbey of *D.* had them; and though by Way of pleading, a lawful Usage be sufficient, yet on Issue thereon, or in any Evidence, it must appear that the Duke or the Abbey had a Substantive of *bona & catalla Felonum*; by *Hale*, Ch. J. and the whole Court:
For

For most Grants of Abbey Lands as these are Relative, and no Substantive Grants appearing, the other Evidence was disallowed, especially for that the Duke of Somerset was attainted, and so his Privileges thereby extinct, unless regranted. 3 *Keb.* 456, in *Sanford and Clerk's Case. Moor* 297.

Deed.
Seals.

Deeds with Seals torn off admitted to declare the Use of a Recovery. *Palmer's Rep.* 403.

Fine.
Recovery.

The Chirograph of a Fine may be given in Evidence, but not given to the Jury; but a Recovery may be delivered in Evidence. 2 *Siderfin* 145, 146. *Plow. Com.* in *Scolastica's Case*, 410.

Recovery in Value in Evidence may be given in Evidence. 2 *Sid.* 145.

Recital.

Recital of a Patent in another Patent is no Evidence of the recited Patent. 2 *Roll.* 678. *B. pl.* 2. *Hardres* 323.

Pedigree.

Upon Evidence to a Jury to prove J. S. to be Heir to W. S. the Court would not accept the Pedigree drawn by an Herald at Arms for Evidence, nor would suffer the Jury to have it with them, but 'tis only Information for Direction. *Pasch.* 8 *Jac. B. R.* Sir *Edward Plumptre* and *Robinson*, 2 *Roll.* 687. *I. pl.* 1.

In Ejectment for Lands, the Earl of *Thanel*, to prove his Discent from *Robert Clifford* in *Edward II.'s* Time, produced a Pedigree drawn by the Heralds; and Sir *William Dugdale* and other Heralds swore it was drawn truly from their Books in their Office; but held not sufficient, without producing the Books and Records from which it was extracted. *T. Jones* 224.

The

The Question being, Whether the Lessor of the Plaintiff was Heir at Law to him that last died seised? To prove the Pedigree, Chief Justice *Pratt* admitted a Visitation in 1623. made by the Heralds, entred in their Books, and kept in their Office, to be read in Evidence: He also admitted the minute Book of a former Visitation, signed by the Heads of the several Families, which was found in the Library of my Lord *Oxford*. *H. 5 G. 1. Pitton v. Walter*, at *Surrey Assizes*, 1 *Str.* 162.

In a Trial at Bar concerning the Custom of the Salt Pits at *Droitwich*, *Camden's Britannia* was offered as Evidence, but it was not allowed. *Skinner* 623. See *postea* 468.

A Verdict for a Lessee is good Evidence Ejectment. for the Reversioner in an Ejectment. *Hardres Rep.* 472.

Secus in Case of Depositions, for the Lessee, for the Reversioner, without being Party to the Suir, can have no Advantage. 472, 473, *Ibid.*

The Act of general Pardon cannot be given in Evidence on *Non debet modo & forma*, Non debet. General Pardons. but ought to be pleaded, for that it is not the General Issue within the Intent of the Act. *Hardres Rep.* 421.

If a Condition be to pay Money at a certain Day and Place to avoid a Feoffment, Acceptance before the Day, although he make an Acquittance, doth not maintain the Issue joined on Payment at the Day and Place. *Moor* 47.

A Recovery in the Court of Antient Demesne, to cut of an Intail which had been suffered a long Time since, and the Possession gone accordingly, was lost; and the Court admitted other Proof of it to be sufficient: And said, A Record lost proved by Testimony.

said, if a Record be lost, it may be proved to a Jury by Testimony. *Anonymous, B. R. 1 Vent. 257.*

Deed shall not be allowed in Evidence until it be stamped.

Where Examinations before the Coroner shall be read in Evidence, and where not.

By 5 & 6 W. & M. cap 21. No Deed shall be given in Evidence in any Court either of Law or Equity, until it be stamped as the Law requires.

Resolved by the Judges, that in Case Witnesses, who were examined before the Coroner, are dead or unable to travel, and Oath made thereof, That such Examinations are the same which he took upon Oath, without any Addition or Alteration; or that in Case Oath should be made, That a Witness who had been examined by the Coroner, was detained by the Procurement of the Prisoner, such Examination may be read; but agreed also, That if a Witness, who was examined by the Coroner, be absent, and Oath made that they have used all their Endeavours to find him, and cannot find him, That is not sufficient to authorize the reading such Examination. *Kelynge 55.*

What Things are necessary to be proved, to charge the Indorfor of a Bill of Exchange in an Action by the Indorsee.

An Action on the Case was brought on a Bill of Exchange against the Indorfor, and it was ruled by *Holt Ch. J.* upon Evidence, That there is no need to prove the Drawer's Hand, because, though it be a forged Bill, the Indorfor is bound to pay it. 2. The Plaintiff must prove, That he demanded it of the Drawer, or him upon whom it was drawn, and that he refused to pay it, or else that he sought him and could not find him; for otherwise he cannot resort to the Indorfor. 3. That this was done in convenient Time; for if they stand and are responsible a convenient Time after the Assignment, and no Demand made, the Indorsee shall not charge the Indorfor. The Time

Time for foreign Bills is three Days, and no Allowance is to be made for Sundays and Holy-days. Serjeant *Wright* cited a Case of one *Tracy*, who stood a Week after the Indorsement, and the Indorsee lost this Money; which *Holt*, Ch. J. thought too strait, but such Matters must be left to the Jury. 4. 'Tis a Question, whether Notice must be given or no; but 'tis fair to give Notice. 5. That the Demand must be proved subsequent to the Indorsement, for if it was precedent, he would only act as Servant to the Indorfor, and so the Demand was insufficient to charge the Indorfor. 6. If a Man indorses his Name upon the Back of the Bill Blank, he puts it in the Power of the Indorsee, to make what Use of it he will, and he may use it as an Acquittance to discharge the Bill, or as an Assignment to charge the Indorfor. 7. In Cases of Bills purchased at a Discount, this is the Difference; if it be a Bill payable to *A.* or Bearer, 'tis an absolute Purchase; but if to *A.* or Order, and it is indorsed blank, and filled up with an Assignment, the Indorfor must warrant it as much as if there had been no Discount. *Lambert* versus *Park*, *Salk.* 128.

Holt Ch. J. held, That the Drawing of a Bill is an actual Promise. *Ibid.*

Indebitatus assumpsit for 5*l.* received to the Record of Plaintiff's Use, being Fees of the Office of Sessions allowed in Clerk of the Peace in *Oxfordshire*; upon *Non Evidence* *assumpsit* it was insisted on, That the Plaintiff had forfeited his Office by not qualifying himself according to Law. And a Record of Sessions was allowed in Evidence to prove the Plaintiff had not taken the Oaths. It was there held by *Holt* Ch. J. That if a Judge admits that

The Matter
of a Record
lost may be
proved.

Counterpart,
where Evi-
dence.

Bill of Ex-
ceptions must
be tendred at
the Trial.

that for Evidence which is not, the other Side cannot demur for that Cause, but must tender a Bill of Exceptions; and he said, he remembered a Cause where the University of Oxford intitled themselves to a Presentation by a Conviction of the Earl of *Sbrewsbury* for Recusancy; and upon giving some Evidence that the Record was lost, the University was permitted to prove the Effect of it by other Evidence, *Thurston versus Slatford*, *Salk.* 284.

Per Holt Ch. J. In a Case in my Lord *Hale's* Time, between *Combe* and *Mayo*, a Counterpart of an ancient Deed was admitted as Evidence of the Deed, and the special Verdict was drawn up, as finding the Deed with a *Prout patet* by the Counterpart, which he said was done to preserve the Precedent: And now, by all the Court, the Counterpart of a Deed without other Circumstances, is not sufficient Evidence, unless in Case of a Fine, in which Case a Counterpart is good Evidence of itself. *Anonymus*, *Salk.* 287.

A Corporation-Book was offered in Evidence at the Assizes, to prove a Member of the Corporation not in Possession, and refused. No Bill of Exceptions was then tendred, nor were the Exceptions reduced to Writing, so the Trial proceeded, and a Verdict was given for the Plaintiff. Next Term the Court was moved for a Bill of Exceptions, and it was stirred and debated in Court. It was urged that the Law requires *quod proponat exceptionem suam*, and no Time is appointed for the reducing of it into Writing; and the Party is not grieved till a Verdict be given against him; and the same Memory that serves the Judges for a new Trial, will serve for a Bill of Exceptions. On the other

other Side, it was said, that this Practice would prove a great Difficulty to Judges, and Delay of Justice; that the Precedents and Entries suppose the Exception to be written down upon its being disallowed, and the Statute ought to be construed so as to prevent Inconvenience: Besides, the Words of the Act are in the Present Tense, and so is the Writ formed on the Act. *Holt Ch. J.* If this Practice should prevail, the Judge would be in a strange Condition: He forgets the Exception, and refuses to sign the Bill, so an Action must be brought; you should have insisted on your Exception at the Trial; you wave it if you acquiesce, and shall not resort back to your Exception after a Verdict against you, when perhaps, if you had stood upon your Exception, the Party had other Evidence, and need not have put the Cause on this Point: The Statute indeed appoints no Time, but the Nature and Reason of the Thing requires the Exception should be reduced to Writing when taken and disallowed, like a special Verdict or Demurrer to Evidence; not that they need be drawn up in Form, but the Substance must be reduced to Writing while the Thing is transacting, because it is to become a Record; so the Motion was denied. *Wright versus Sharp, Salk. 288.*

Upon a Trial at Bar in this Case, a Deed Indenture of Bargain and Sale acknowledged by the Bargainee and enrolled, by which a Term for Years was assigned, was given in Evidence without any Proof made of the Bargainor's Sealing and Delivery thereof. And after Debate it was allowed *per Holt Ch. J. and Eyre Justice, & tot. Cur.* for the Acknowledgment of

Bargain and Sale inrolled, may be given in Evidence without proving the Execution.

of the Party in a Court of Record, or before a Master extraordinary in the Country, (as this was) is good Evidence of its being sealed and delivered: And such an Acknowledgment estops a Man from pleading *Non est factum*. Also Inrolments of Deeds on the Statute, are admitted every Day in Evidence without Witnesses of the Sealing and Delivery; and it is the Acknowledgment which gives it Credit, and not its Operation or Contents. Also they held a sworn Copy of a Deed good Evidence. *Smartle versus Williams, Salk. 280.*

Depositions
before a Ju-
stice, Evi-
dence only in
Felony.

In an Information for a Libel against the Government, Not guilty being pleaded, upon Trial the Attorney General offered in Evidence Depositions taken before a Justice of Peace, relating to the Fact, the Deponent being since dead. *Et per Cur.* upon Advice with the Justices of the Common Pleas; in Cases of Felony, such Depositions before a Justice, if the Deponent die, may be used in Evidence, by the Statute 1 & 2 Ph. & Mar. cap. 13. But this cannot be extended farther than the particular Case of Felony, and therefore not to this Case. *Rex versus Paine, Salk. 281. 5 Mod. 161.*

A History
may be Evi-
dence to
prove a Mat-
ter relating to
the Kingdom
in general,
but not a par-
ticular Right.

An Issue was directed out of Chancery, wherein the Question was, Whether by the Custom of *Droitwich*, Salt-pits could be sunk in any Part of the Town, or in a certain Place only? And upon a Trial at Bar, *Camden's Britannia* was offered in Evidence, but refused: For the Court held, *That a general History might be given in Evidence to prove a Matter relating to the Kingdom in general, because the Nature of the Thing requires it, but not to prove a particular Right or Custom; so in the Case of St.*

Katharine's

Katharine's Hospital. Hale Ch. Justice allowed a Chronicle to be Evidence of a particular Point of History in *Edward the Third's Time*: So *Speed's Chron.* was admitted in Evidence to shew the Death of Queen *Isabel*, Dowager of *Ed. 2. Vin. Evidence* 119, 120. So a *Year-Book* may be Evidence to prove the Course of the Court; yet in this Case it was admitted, That *Heralds Books* are good Evidence as to *Heralds Books, Parish-Registers, &c.* Pedigrees, and *Parish-Registers* as to Births and Marriages, upon the Nature of the Thing; and it was said, That in the Exchequer the Question being, Whether the Abbey *De Sentibus* was an inferior Abbey or not? *Dugdale's Monasticon Anglicanum* was refused for Evidence, because the original Records might be had in the Augmentation-Office. *Stainer versus The Burgesses of Droitwich, Salk. 281.*

An Almanack, in which the Father wrote the Nativity of his Son, was admitted and allowed to be strong Evidence at a Trial at Bar, to prove the Nonage of the Son. *Raym. 84.*

The Almanack is sufficient Evidence to prove a Day Sunday, or what Day is the Return Day. 1 *Sid. 300. Cro. Eliz. 227. 1 Leon. 242. 6 Mod. 41.* See Lord *Raym. 4, 281, 870, 1544, 1556. Raym. 84. 11 Mod. 41. Note*; The Almanack to go by, is that annexed to the Common Prayer Book. 6 *Mod. 81.*

In Ejectment for the Barony of *Cockermouth*, and all the Manors, &c. of *Joscelin* late Earl of *Northumberland*, of the Family of *Piercy*; Sir *William Dugdale's Baronage of England* was refused to be read to prove a Discent. *T. Jones 164.*

The Impropiator and the Parishioners having a Dispute concerning the Right of an House, brought Ejectment, and moved for Leave to inspect the Parish Books, and take Copies of what concerned his Title; but the Court denied it. *5 Mod.* 395.

In an Action concerning *India Stock*, the Court ordered the Transfer-Books of the Company to be produced at the Trial, and that the Parties might have Copies. *Farell.* 129.

In *Quare Impedit*, the Defendant pleads, that he was retained a Chaplain to the Countess of *Derby*, and had a Dispensation to hold two Livings; the King replied, that *Banks* and *Travers* were retained Chaplains to her before; and the Incumbent traversed the Retainer of *Travers*; and to prove it, a Copy of the Retainer of *Travers* entred in the Court of Faculties was produced; but held not Evidence. *Lit. Rep.* 1.

A Verdict on a voidable Trial read in Evidence. *1 Str.* 308.

A Special Verdict between two Parties, not received in Evidence of a Pedigree. *2 Str.* 1151.

Affidavit of a Dead Man read to prove his Marriage, that was taken before a Surrogate, no Cause being in Court. *1 Str.* 35.

The Day-Book from whence the Parish Register is made up, not allowed in a Question of Legitimacy. *2 Str.* 1073.

Of Evidence in Courts of Equity, and the Ecclesiastical Courts.

Office Copies of Depositions are Evidence in Chancery, but not at Common Law, without Examination with the Roll; for the Court of Chancery have, for Convenience, allowed those Office Copies to be Evidence in their own Court, and have impowered their Officers to make out such Copies as should be Evidence; but the particular Rules of their Court are not taken Notice of by the Courts of Common Law. *Gilb. Law of Evid.* 26.

Cannot read Depositions of a Witness examined fifty Years before, without some Account of his Death. 2 *Str.* 920. in the Exchequer.

Depositions in the Ecclesiastical Court cannot Depositions be given in Evidence, tho' the Parties be dead, *March* 120. A Defendant's Answer in an *English* Court is good Evidence against him, but not against others. *Godbolt* 326.

I cannot make use of Depositions in a Cause wherein I was not a Party, (a) for as they can-

(a) Depositions cannot be given in Evidence against any Person who was not Party to the Suit; and the Reason is, because he hath not Liberty to cross examine the Witnesses; and it is against natural Justice that a Man should be concluded in a Cause to which he never was Party. *Hardr.* 22, 472. *Bunb.* 50. *pl.* 84. 91. *pl.* 148. 321. *pl.* 403. 9 *Mod.* 229. *Carth.* 181. *Vern.* 113. *Gilb. Evid.* 62. *Prec. in Chanc.* 212. But if a Witness is examined in Chancery, you may read, without an Order, any other Depositions of the same Person in the Spiritual Court, or elsewhere, in any other Cause, so as you make use of them only to confront the Evidence he then gives.

not be read against me, no more can they be read for me, because I am not bound by them, nor in a Capacity of examining Witnesses in it, or preferring Interrogatories. And it is not like the Case of an Ejectment brought by a Reversioner, or Debt upon the Statute of *Ed. 6.* brought by a Proprietor of Tithes, after a Verdict a Law; for the Lessee or the present Proprietor, the Reversioner of the Lands or Tithes, shall have Advantage of the *Verdict*, and give it in Evidence; and the Reasons are, because they cannot be immediate Parties to the Action or Suit, for that must be prosecuted by the Lessee or present Tenant, and they may give it in Evidence, as well as the Plaintiff himself; but it is otherwise in Case of *Depositions*, for there only Parties to the Suit can examine or interrogate; likewise the Reversioner or Seigniores, (whose Tenants were only Parties in the former Suit) might themselves have been Parties in a Suit in Equity. The Countess of *Pembroke's Case*, *Hardr. Rep.* 472.

The Depositions of a Witness taken before Answer, to preserve his Testimony, who dieth after Answer, shall not be given in Evidence, although he continued so sick, that he could not be examined after Answer. *Hardr. Rep.* 315.

Depositions in Chancery of Witnesses that are dead may be read at the Assizes betwixt the same Parties, proving the Bill and Answer.

See *Keb.* 2 Part 31. An old Exemplification of a Decree in Chancery given in Evidence, although the Bill and Answer were not in it; for above forty Years since it was not usual to insert Bill and Answer.

The

The Answer of one Defendant is not Evidence against another Defendant, unless he refer to it..

If Witnesses are examined *de bene esse*, before Answer upon a Contempt, such Depositions cannot be made use of in any other Court, but in the Court only where they were taken; the Reason seems to be, because there was no Issue joined, so as there could be a legal Examination, and they were only taken to be read in the Court in which they were taken, upon a Contempt to that particular Court *Hardr. Rep. 332.*

If a Witness be examined *de bene esse*, and before the coming in of the Answer, the Defendant not being in Contempt, the Witness dies, yet his Deposition shall not be read, because the opposite Party had not the Power to cross-examine him; and the Rule of the Common Law is strict to this, that no Evidence shall be admitted, but what is or might be under the Examination of both Parties. *Gilb. L. of Evid. 65. Hard. 315. 2 Jon. 164. 1 Wms. 414, 415. 2 Wms. 563.*

An Answer in *Chancery* is Evidence against the Defendant (a) himself; but the Bill must be proved. *Godb. 326.*

If

(a) If a Bill in Chancery be Evidence against the Complainant, how much more is the Answer against the Defendant, which carries still a higher Weight of Probability along with it, because this is delivered in upon Oath, and therefore over and above the single Confession; it has an Authority from the Sanction of an Oath. But when you read an Answer, the Confession must be all taken together; and you must not take only what makes against him, and leave out what makes for him; for the Answer is read as the Sense of the Party himself, and if it is to be taken

If the Party make Oath that he cannot find his Witness, then he is as it were dead, and his Depositions in an *English* Court may be given in Evidence betwixt the same Parties. *Godb.* 327. Not only the Plaintiff but any Stranger may give the Defendant's Answer in Evidence against the Defendant, but not against others. *Sid.* 222. A Bill in Chancery given in Evidence against the Plaintiff himself, where there are Proceedings upon it. *Keb.* 2 Part 499. See *p.* 478.

To prove a Jointure in Ejectment, Depositions in Chancery were produced, but the Bill and Answer were taken off the File and lost; but to shew that a Bill was once filed, the Six Clerks Book was produced, and an Inrolment of the Decree which mentioned both Bill and Answer; and held sufficient. *5 Mod.* 210. *Haines's Case.*

Depositions.
Roll. Trial,
679. pl. 7.
8. 9.

Depositions in the Court Christian, or in the Court of the Council of *York*, touching the Title of Land, of which they have not Cognisance, or in another suit against him, who claimeth not under those Parties, or by the Commissioners upon a Commission of Bankrupt, because the Party could not cross-examine, shall not be allowed in Evidence. But see *Keb.* 2 Part 348.

Depositions in a Court not of Record, as the Spiritual Court, though it be in a Case in

taken in this Manner, you must take it intire and unbroken. *Gilb. Law of Evid.* 51.

An Infant's Answer by his Guardian shall never be admitted in Evidence against him on a Trial at Law, for the Law has that Tenderness for the Affairs of Infants, that it will not suffer them to be prejudiced by the Guardian's Oath. *Ibid.* 51.

which

which they have Jurisdiction, shall not be given in Evidence to a Jury. *Littleton Rep.* 167.

In an Action on the Case against a Parish Clerk, Depositions taken in the Ecclesiastical Court were permitted to be read, the Witnesses being dead; but it was refused to let the Jury have them with them. *Clayt.* 62.

But a Sentence given in the Spiritual Court touching Tithes, may be given in Evidence in an Action at Common Law, for this is a Judicial Act. *2 Roll* 679. *pl. 6.*

A Thing which is concluded in the Ecclesiastical Court concerning Lands, is not to be given in Evidence to Juries, for the Courts of Common Law are not to be guided by their Proceedings. *Mich. 22 Car. B. R. Style* 10. Proceedings
in Ecclesiasti-
cal Court.

Regularly the Depositions in Chancery of a Witness shall not be given in Evidence if he be alive, although he be beyond Sea, as in *Ireland, &c.* Otherwise if he be in *France*, or another Kingdom not subject to the Dominion of our King. See *p.* 476.

Note, That the Depositions taken before the Commissioners of Bankrupts shall not be used as Evidence at a Trial, although the Witnesses be dead. But Depositions taken before the Coroner, with Proof that the Party that made them is dead, shall be good Evidence, as it was ruled in the Case of the King and *Browning, Pasch.* *Mich. 16 Car. 2. B. R.* *Roll. Trial,* 679. *pl. 9.* *Depositions.* *Bankrupt.* *Coroner.* *18 Car. 2. B. R.*

A Decree produced in Paper, is not to be given in Evidence without Bill and Answer; *per Twisden.* Otherwise if not in Paper. *1 Keb. 21.*

A Decree in Chancery may be given in Evidence, and so may a Sentence in the Ecclesiastical Courts, for their Judgments must be of

Authority in those Cases, where the Law gives them a Jurisdiction, for it were very absurd that the Law should give them a Jurisdiction, and yet not to suffer what is done by Force of that Jurisdiction to be a full Proof, for that were to suppose they were incompetent Judges, where they had Jurisdiction. *Gilb. Law of Evid.* 68. 2 *Mod.* 231. 2 *Str.* 960, 961.

Where a verbal Declaration shall re-establish a Promise in Writing that had been revoked.

The Father wrote a Letter signifying his Assent to the Marriage of his Daughter with J. S. and that he would give her 1500 *l.* but signified in another Letter that he would not stand to these Proposals: He some Time afterwards declared, That he would agree to what was proposed in his first Letter. It was held, that this verbal Declaration had re-established the Promise in the first Letter, and that it was a sufficient Promise in Writing within the Meaning of the Statute of Frauds. *Bird versus Bloss* in *Chanc.* 2 *Vent.* 361.

Depositions taken in *Chanc. de bene esse*, are Evidence at Law where the Witness dies before Answer.

Depositions after Answer read in Evidence where the Witness cannot be found.

In Ejectment at a Trial, Depositions taken in *Chancery de bene esse*, where the Witness died before answer put in, were held to be good Evidence; and upon this Evidence a Verdict *pro Quer.* It was held also, That Depositions after Answer between the same Parties might be read in Evidence, though the Witness were not dead, if he could not be found upon Search. *Howard versus Tremaine*, *Mich.* 4 *W. & M. B. R.* *Shower* 363. *Salk.* 278. *Holt Hesitavit.* See p. 475.

Depositions *in perpetuam rei memoriam*

On a Trial at Bar in *C. B.* this Point arose, viz. Depositions had been taken in *Chancery*, are not to be read in Evidence while Party lives.

in perpetuam rei memoriam. And it happened afterwards that the Inheritance of the same Land descended to the Person, who was sworn as a Witness, and he was now a Party to the Suit in Ejectment. And the Question was, Whether these Depositions could be read in the Cause? *Trevor* Ch. J. held, That they ought; for that he was disabled to give Evidence by the Act of God, so that it was in Effect the same Thing as if he were dead. *Tracy* and *Blencason* *contr.* Hereupon *Tracy* came into B. R. to ask the Opinion of the Court; and the Court agreed, they ought not to be read: For *per Holt* Ch. J. The only Intent of such Depositions was to perpetuate Testimony in Case the Witnesses died, and they cannot be read in any Case between other Parties till after the Death of the Witness, who is to appear and give his Evidence *viva voce*, so long as he lives; much less can they be read in this Case, where the Witness himself is Party. To which *Trevor* Ch. J. agreed. *Tilley's Case*, *Salk.* 286.

On an Appeal from the Commissioners of Excise to the Commissioners of Appeals, the Depositions of the Witnesses taken before the Commissioners of Excise ought not to be read, but they ought to examine the Witnesses *de novo viva voce*. And *Holt* C. J. said he thought that if the Witnesses were dead their Depositions might be read.

Bill and Answer.

Bill in Chancery allowed in *Dom' Pro'* as Evidence to confront a Woman who pretended Marriage. *Vin. Abr.* Title *Evid.* 88. *pl.* 3. cites *Parl. Coll.* N. 88.

The Infant's Guardian's Answer in Chancery of a Feoffee in Trust, was refused by the Court to be given as Evidence; because he was living, and not Party to the Suit, which was only between the Heir and *Cestui que Trust*. *Vin. Abr.* *Tit. Evid.* 88. *pl.* 1.

An Answer in an *English* Court is good Evidence to a Jury against the Defendant himself, but not against other Parties; yet it is not binding to the Jury. *Godb.* 326. *pl.* 418. *E.* 21 *Jac. B. R. Anon'*. Not good Evidence against his Alience. 1 *Salk.* 286. 1 *Mod.* 301. 6 *Mod.* 44. *Mich.* 2 *Ann. B. R.* in Case of *Ford v. Lord Grey*.

If the Plaintiff will read the Defendant's Answer in Chancery against him in Evidence, the Defendant may likewise take Advantage thereof; for all is Evidence, or none. *Per Holt Ch. J. Hil. 8 W. 3. B. R. Lynch v. Clerk,* 3 *Salk.* 154.

An Answer in Chancery cannot be given in Evidence for the Party who made it, or against a third Person not deriving any Title under him. *T. 9 Geo. 1. Hilliard v. Phaley & al.* 8 *Mod.* 181. *Vin. Abr.* 88. *pl.* 6.

Allegations by a Complainant in a Bill in Chancery shall by a Copy be made use of as Evidence against the Complainant, in a Suit at Law, for it shall be intended to be exhibited by his Consent and Privy. But *per Bridgman*

Bridgman, there is a Difference where there is a Proceeding upon such Bill, and where not; for in the first Case, it shall be admitted in Evidence, but in the second not. If Bill be preferred *sans Privity* of the Plaintiff, an Action lies. *Vin. Abr. Tit. Evid. 88. pl. 2. See p. 474.*

Of Evidence in Account.

Account pleaded before two; Account before one is good Evidence, *Hob. 55.* because the Account is the Substance.

In Debt for Arrearages of an Account, upon *Nil debet modo & forma*, no Account is good Evidence. 20 H. 6. 26. *Roll. Trial, 677. pl. 26.*

Upon *Ne unques son Receiver, &c.* the Defendant cannot say that he paid the Money according to Directions, &c. *Dyer 196.*

Against S. as Receiver of two 30*l.* and as Bailiff for receiving his Rents for several Years, not saying any certain Sum of Rents: *Per Earl Serjeant*, The proper Way is to find *quod Computet*, as to what is certain in the Declaration, and so proved, as the Money was, but not to the Rents; and so he said was the Opinion of *Hale*. But *per Moreton Justice*, the Verdict shall be general, and it may be both Ways. *Saye's Case, Norf. Lent Assizes 1667.*

Debt for 10*l.* *pro eo quod cum* the Defendant had accounted with the Plaintiff for diverse Sums as due, and was found in Arrear 8*l.* and a *Mutuatius* for 2*l.* and on the Trial it was proved, That Defendant and Plaintiff's Wife reckoned that Defendant had borrowed at one Time 40*s.* at another Time 40*s.* and at another Time 4*l.* and that he promised to
pay

pay the 8 *l.* and held by *Holt Ch. J.* That this is good Evidence of an Account. 1 *Show.* 215.

Upon *Ne unques son Receiver*, the Defendant cannot give in Evidence a Release from the Plaintiff. 1 *Brownlow* 24. *Willowby* versus *Small*.

Harrington brought Account against *Deane* for 200 *l.* received by the Hands of Sir *J. Rotherham*; the Defendant pleads that he was never his Receiver, and the Jury found, that Sir *John Rotherham* was indebted to the Plaintiff 200 *l.* that the Plaintiff willed *Deane* to require and receive the Money of Sir *John Rotherham*; that thereupon *Rotherham* prayed *Deane* to borrow the Money of any body, and pay it the Plaintiff: That he accordingly borrowed 200 *l.* for *Rotherham* of *J. S.* and received it; and that *Rotherham* gave *J. S.* a Bond for the Money. Held the Action well maintained. *Hob.* 36.

Of Evidence in Actions on the Case.

In an Action on the Case for 20 Guineas, the Value need not be set forth in the Declaration, but it may be given in Evidence to the Jury; but in Debt for them it is otherwise, and the Value must appear, but in Case the Action is brought for Damages. *Vin. Value* 938.

Quare defendens Crimen felonix ei imposuit, &c. The Plaintiff cannot give in Evidence Words only, but Acts; as arresting, charging or conventing him before a Justice of Peace for Felony. *Saunders* versus *Edwards*, *Mich.* 14 *Car.* 2. *B. R.* 1 *Keb.* 389.

Case

Case for maliciously prosecuting an Indictment of Perjury; and it appeared the Defendant was a Justice of Peace, and procured some as Witnesses to appear against the Plaintiff, and his own Name was indorsed on the Indictment; held this was not sufficient to prove him a Prosecutor. And on the other Side it was proved, that the Indictment was drawn by Order of the Sessions; and Plaintiff nonsuited, with a Reprimand. 1 *Vent.* 47. 2 *Keb.* 572.

Case by Baron and Feme for maliciously prosecuting the Defendant for Felony in stealing Goods, of which she was acquitted. And *Holt* Ch. J. allowed the Oath, which the Prosecutor (now Defendant) had made at the Trial of the Indictment, of the Felony being committed, to be given in Evidence for the Defendant, to prove a Felony committed; else, he said, one that was robbed alone, if he prosecuted the Felon, and he was acquitted, would be liable to an Action, without a Possibility of making a Defence. 6 *Mod.* 216.

Case for a malicious Prosecution of Plaintiff for Barrettry; and set forth, that he was *inde legitimo modo acquietatus*, and to prove it at the Trial produced a *Nolle prosequi* by the Attorney General; and held the Action would not lie, for the *Nolle prosequi* is only a Discharge of the Indictment, but no Acquittal of the Crime. 1 *Salk.* 21. 6 *Mod.* 261.

If any Action arises on Request, as in Trover or special Promise, the Statute of Limitation goes only to the Request. *Juy's Case*, *Mich.* 1562. *C. B.* 1 *Cro.* 139.

Declaration for Words spoken in the Presence of *A. B.* and others; in Evidence it sufficeth, that they were spoken in the Presence of others

others only. *Winckfield and Coot, Lent Assizes Norfolk, 1662, per Hale Ch. Baron.*

In *Indebitatus* for carrying of Herrings; the Evidence was, he was a Porter at *Yarmouth*, and when Herring-Ships came Home, he went (of his own Head) and carried up to the Defendant's House, with other Porters, so many Herrings; and good by *Twisden*, Judge of *Assise, Norf. Summer 1662. Fermin versus Lucas.*

Pew.
Keb. 2 Part
342.
1 Sid 88.
1 Lev. 71.
1 Keb. 345.

In an Action for hindring to sit in a Pew, claimed by Prescription, repaired, &c. ought to be given in Evidence; and one may prescribe to sit in the uppermost Seat in a Pew. *Buckston and Bateman, Mich. 14 Car. 2. B. R.*

Case by Sir *H. Snelgrave* and *A. B.* against *Brograve*, for disturbing them of a Seat in the Church; and declare, That they, and those whose Estate they have, from Time immemorial used to have a Seat in the Church; the Defendant traverses, that the Plaintiffs, and those whose Estate they had, &c. had the Seat *modo & formâ*: And on Evidence it appeared the Plaintiffs were Tenants in Common; and held this did not prove the Issue, for they cannot join in a joint Prescription. *Palmer 161.*

Where-ever a Person intitles himself to a Seat in a Church by Prescription, though he do not alledge that he used to repair it, yet he shall be obliged at the Trial to prove, that he, or those whose Estate he had, used to repair; or else he will fail in his Prescription. 1 *Siderf. 203.*

In Action for executing an illegal Warrant, &c. It is good Evidence to prove the Justice of Peace acted as such, without shewing his Commission; so on the Statute of *Hue and Cry.*
Constable's

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Constable's Case, Norf. Lent Assizes, per Hale Chief Baron.

Action for stopping up Lights, &c. One had a Piece of Ground, and builds an House on Part and leases it, then he sells the other Part of the Ground to one who builds on it, and stops up the Lights of the first House, the Lessee has a good Action. But if two own two Pieces of Ground, and one builds, the other may also build and stop up his Lights. *Palmer versus Flesher, Mich. 15 Car. 2. B. R. 1 Keb. 553.*

If a Master always gives his Servant Money to buy his Markets with, it is good Evidence to discharge the Master in an Action brought against him for Goods taken up on Trust by that Servant. *Per Glyn Chief Justice, Mich. 1658. at Guildball, Sir Thomas Rouse's Case.*

The Master declared, That the Defendant Master dug a Pit, and as he was driving his Horse, he fell in the Pit, &c. To prove the Servant drove the Horse doth not maintain the Declaration. *Style 335.*

A Watercourse runs through my Grounds to the Grounds of J. S. where is a Pit that Time out of Mind used to be filled with that Water; I may stop the Water in my Ground, and use it as I will, so I do not turn the Course another Way; but when I have done with it, I must let it fall into its own Course. *Per St. John Chief Justice C. B. Suff. Summer Assizes 1657. Smart and Tystead.*

Action for Words, *You forswore yourself in your Answer in Chancery.* Defendant justifies. Plaintiff replies *de injuria sua propria absque tali Causa.* *Per Hale, Summer Assizes, Suffolk,*
It

It is a good Replication, and a small Mistake in an Answer shall not convict of Perjury, for the Counsel may mistake, or his Clerk.

Action for not scouring a Ditch, by which the Water overflowed his Land, &c. and declare *quod quidam Rivus* ran there, &c. Upon Evidence it appeared only a Land Flood, and good by Name of *Rivus*, though it be dry great Part of the Year; and it was held the best Pleading of the Course of this River to put a Place from whence it comes, and so to the Plaintiff's Land, without mentioning mean Places by which it passes, which may be many, and must be proved if laid. *Per Whitfield 1641. York, Clayton 96.*

Case for maliciously turning away Part of a Course of Water, that ran from a Fountain in *Clerkenwell* to the Plaintiff's House in *White Fryers*; and on Evidence it appears that the Ancestors of the Defendant had caused a Leaden Pipe to be laid to the main Pipe, through which the Water ran, and that Defendant had used the Water, by opening the Cock when he pleased; and held the Defendant liable, and Judgment for the Plaintiff. *Dyer 320. Bendlows 215.*

Soldiers lying in an Inn fourteen Days, are Guests within the Custom of *England*. *Harland's Case, per Whitfield 1647.*

The Plaintiff in an Action of the Case intitles himself, by Prescription, to a Foldcourse for Sheep upon all the Lands in such a Field on *Michaelmas-day*, and so to *Lady-day*, the Lands being unsown, and for that the Defendant put on Sheep, &c. before *Michaelmas-day* and after, and thereby fed the Grounds, &c.

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Ec. the Plaintiff could not take so good Feed, *actio inde.*

1. The Owner may put on Sheep, and feed his own Grounds before *Michaelmas*, unless a Custom be to the contrary, which ought to be laid in the Declaration. *Contra* of a Stranger.

2. It appearing that Part of the Lands, Ec. had been the Lands of the Plaintiff, who was Lord of the Manor, and prescribed as such, and there being no Exception of those Lands in the Prescription, the Plaintiff was nonsuit; for as to those Lands the Prescription is gone by Unity of Possession. *Per Hale* Chief Baron, *Norfolk, Summer Assizes, 1661. Brantbwait versus Hunt.*

In Action upon the Case for retaining of his Servant, *per quod servitium amisit*, the Plaintiff ought to prove that the Defendant had Conusance, that he was his Servant. *Eod. Termin.*

In Case against a Sheriff upon an Escape suffered by a Bailiff, the Plaintiff ought to prove that such Process and Warrant issued, that such a Debt was due to him, and that the Party arrested was now become insolvent; or else he is not intitled to recover Damages to the Value of the Debt. *Clayton* 84.

Case for falsely and fraudulently selling an Horse to the Plaintiff, as Defendant's own Horse, *ubi revera* it was the Horse of J. S. the Plaintiff was nonsuited, because he could not prove that Defendant knew it was not his own Horse. *Aleyn* 91.

In an Action on the Case, when the Request is laid at one Time in the Declaration, a Request at another Time may be given in Evidence. *Sid. Rep.* 268. *Request another Day.*

Where Advantage is taken of a Recital, all must be admitted that is recited.

And in an Action of the Case for the Profits of an Office, sufficient to shew the Profits *Communibus annis*.

Where a Plaintiff goes upon the Credit of both Partners, the Act of one is Evidence against the other, unless he shews a Disclaimer.

In an Action on the Case for the Profits of Master of the King's Wardrobe, it was insisted for the Defendant, That the Plaintiff's Patent having recited a former Grant, he must prove that Grant to have been surrendered: To which it was answered, That if they took Advantage of the Recital, they must admit all that was recited, as well the Surrender as the Grant. And of that Opinion was the Court. And it was said, That in an Action of this Nature, it is not necessary to shew every particular Sum received by the Defendant; but it is a good Evidence for the Damage to shew the Profit of the Office *Communibus annis*. Earl of Montague versus Lord Preston, 2 Vent. 170.

In an Action on the Case for Money had and received to the Plaintiff's Use, it appeared upon Evidence, That *Layfield* and the other Defendants were Bankers and Partners, and that the Plaintiff had given *Layfield* 20*s.* for which he received a Ticket in the double Exchange-Lottery, and *Layfield* undertook to pay what Benefit should happen thereupon. That the Ticket came up a 40*l.* Benefit, and for that Money the Action was brought. And it was objected for the Defendant, That the Action was brought against *Layfield* and his Partners; and it did not appear that any had undertaken to be Trustees in the Lottery but *Layfield*, and therefore he only ought to be charged, and not his Partners. To which Holt Ch. J. answered, That it appeared they were Partners in their Trade, and Goldsmiths, and the Adventures put their Money in upon the Credit of the several Goldsmiths that had undertaken to pay the Benefits; and it should be presumed

presumed the Act of *Layfield* was the Act of the other, and should bind him, unless he could shew a Disclaimer and a Refusal to be concerned in it; and accordingly the Plaintiff had a Verdict for forty Pounds.——Versus *Layfield & al^s*, *Salkeld* 291.

Case for a Deceit, for that the Plaintiff bought of Defendant several Parcels of Silk for——Silk, whereas it was another Sort, and that the Defendant well knowing this sold it him for——Silk; and on Evidence it appeared, that there was no actual Deceit in the Defendant, who was a Merchant, but that the Deceit was in his Factor abroad; and held by *Holt* Ch. J. that the Merchant was answerable for this Deceit of his Factor *Civiliter*, tho' not *Criminaliter*; and that it was more reasonable, that the Defendant, who trusted the Deceiver, should be a Loser than a Stranger. 1 *Salk.* 289. *Hern v. Nichols.*

An Action on the Case upon the Custom of Master of a the Realm was brought against the Defen- Stage-Coach
dant, being Master of a Stage-Coach, and the not chargeable
Plaintiff set forth that he took Place in the for goods lost
Coach for such a Town, and that in the Jour- by the Driver,
ney the Defendant by this Negligence lost a unless the Ma-
Trunk of the Plaintiff's: Upon Not guilty ster takes a
pleaded, upon the Evidence it appeared, That Price for the
this Trunk was delivered to the Person that Carriage of
drove the Coach, and he promised to take Goods.
Care of it, and that the Trunk was lost out
of the Coachman's Possession; and if the Ma-
ster was chargeable with this Action, was the
Question. *Holt*, Ch. J. was of Opinion, That
this Action did not lie against the Master, and
that a Stage-Coachman was not within the
Custom as a Carrier is, unless such as take a

distinct Price for carrying Goods as well as Persons, as Waggon with Coaches; and tho' Money be given to the Driver, yet that is a Gratuity, and cannot bring the Master within the Custom: For the Master is not chargeable with the Acts of his Servant, but when he acts in Execution of the Authority given by his Master; and then the Act of the Servant is the Act of the Master; and the Plaintiff was nonsuited. *Middleton versus Fowler, Sal-keld* 282.

Case against an Innkeeper, for that Plaintiff brought Goods into Defendant's Inn, was lodged there, and robbed by the Default of Defendant and his Servants; Defendant pleads that Plaintiff was not robbed by the Default of him or his Servants; and in Evidence it appeared, that Plaintiff came to lodge with Defendant, that Defendant told him that his Inn was full, and that he could not lodge him; that notwithstanding, the Plaintiff would stay, and lodged with another Man, without the Consent of Defendant or his Servants; held that Defendant was not liable. *Dyer* 158. b. 1 *Ander-son* 29. See p. 489.

Case against a Carrier on the Custom of the Realm, for not delivering a Box with Goods and 100*l.* in Money in it; and on Evidence it appeared the Plaintiff delivered the Box to the Defendant's Porter, and told him, there was a Book and Tobaccō in the Box, but said nothing of the Money; and held by *Rolle*, That the Carrier was answerable for the Money, though he was not informed of it; but told the Jury, in Regard of the intended Cheat to the Carrier, they might consider him in Damages. *Aleyn* 93.

In

In an Action on the Custom for safe Carriage, Evidence of the Delivery and Charge to carry them safe, good, without saying whither, because it shall be intended to the Place where he usually came. *Gilb. L. of Evid.* 242.

In an Action for safe Carriage, if no Price be set, it shall be intended for the Common Price; but if a special Agreement be set out to carry for 4s. a hundred, it must be proved that the common rate is to carry for 4s. an hundred. *Ibid.*

In an Action on the Case brought against an Innkeeper for suffering the Goods of the Plaintiff his Guest to be taken out of his House, and upon Not guilty pleaded, the Defendant may give in Evidence that he told the Plaintiff that his House was full, and that he could not lodge him, and that notwithstanding the Plaintiff went in and lodged in his House; for this Evidence falsifies the Declaration, for it proves that there was no Injury done to the Plaintiff as Guest to the Defendant. *Gilb. Law of Evid.* 259. See p. 488.

In Action against Acceptor of a Bill need not prove the Hand of the Drawer. *Str.* 648.

In Action against Indorser must prove Demand on Drawer. *Str.* 649.

Of Evidence in Assumpsit.

In an *Assumpsit in Deed*, the very Contract must be set forth in the Declaration; but in *Assumpsit in Law*, if the Plaintiff shews Part of the Goods delivered, or Part of the Money lent, it is good. *Gilb. Law of Evid.* 193, 172.

Assumpsit.

In an *Assumpsit in Law*, actual Payment, or any other Matter that excuses Payment, may be given in Evidence on *Non assumpsit*; but in an *Assumpsit in Deed* it must be pleaded. *Gillb. L. of Evid.* 204, 205.

Upon an *Assumpsit* to the Husband, an *Assumpsit* to the Wife and his Agreement is good Evidence. 27 H. 8. 29. Upon *Non Assumpsit* to a special Promise, Payment is no Evidence; by three Judges.

Indebitatus Assumpsit.

Upon *Non Assumpsit* in a general *Indebitatus Assumpsit*, the Defendant may give in Evidence Payment at any Time before the Action brought; but upon a special Promise to pay Money, &c. it is otherwise; *Causa patet*; for in the first Case, if there be no Debt, the Law will infer no Promise. 1 *Mod.* 210.

In *Indebitatus*, Covenant to pay is no Evidence. 2 *Cro.* 505. Nor Money due for Rent by Specialty, or on Record. *Hob.* 284. *Hutt.* 35.

Indebitat. for Money lent, Money received to Plaintiff's Use, & *insimul computasset*. Plaintiff gives in Evidence only a Letter, whereby the Defendant promised shortly to pay him 30*l.* he owed him. Held *per Holt Ch. J.* that this would not do, for it might be due on Bond or otherwise; it is true, a Note to pay a Sum of Money on Demand, is *prima facie* Evidence of Money lent, unless the contrary appear; but it is not so here, and the Plaintiff was nonsuit. *Comberb.* 349.

But an Account stated for Rent and other Things is good Evidence.

Baron and Feme.

Indebitatus Assumpsit against Baron for Necessaries for his Wife, they must be according to his Estate, as well as Degree. *Siderfin* 128.

If

Ch. 15. *Of Evidence in Assumpsit.*

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If she doth not cohabit with him, the Action doth not lie. If the Goods bought by the Wife or Servant come to the Use of the Husband, although this be no binding Evidence, yet this presumptive Evidence shall charge him.

He may forbid one or two, &c. to let her have Goods, but a general forbidding also is void. *Keb. 2 Part 554.*

If Husband and Wife cohabit, and the Wife deals separately, her Contracts shall bind the Husband; for Cohabitation is sufficient Evidence of Notice. *1 Salk. 113. 6 Mod. 162.*

Per Hale Ch. J. deins Age may be given in Infancy. Evidence on *Non Assumpsit*, in an *Indebitatus* ² *Lev. 144.* *Assumpsit. Keb. Rep. 2 Part 851. Painter and Bowman's Case.*

Infancy cannot be given in Evidence, but must be pleaded. *Gilb. L. of Evid. 165. 2u.* For the contrary is in Use, and it goes to the Gift of the Action. See p. 498.

A Feme Covert may plead *Non Assumpsit*, and give Coverture in Evidence; because Coverture makes it no Promise. *6 Mod. 230. Gilb. L. of Evid. 165.*

Indebitatus will not lie for Money won ¹ *Keb. 216.* at Dice. *Wiche's Case, Hill. 14, 15 Car. 2. B. R.*

An *Assumpsit* to pay 50*l.* in Consideration Plaintiff would permit the Defendant to enjoy Lands from 10 *Aug.* till 1 *May* following, will lie on an express Promise, but not on the Promise in Law. *3 Lev. 150. Johnson versus May.*

If a Promise be made to pay at a Day certain, and the Day is past, the Plaintiff may declare to pay on Request: So if he declare on

L 4

Payment

Payment at a Day certain, and give in Evidence a Promise on Request, *i. e.* when it is created on Account which gives the Duty, for there the Time is *ex abundanti*; but where the Action is founded on the Contract, otherwise; for there the Evidence must pursue the Contract. *Hill. 1650. B. R. Child's Case.*

Assumpsit, in Consideration Plaintiff would deliver to *J. S.* 10 Quarters of Malt, to pay him on Request, if *J. S.* did not; and avers that he delivered the Malt to *J. S.* who had not paid, that he requested Defendant to pay, and that he had not paid; on *Non Assumpsit*, held by *Twisden* and *Windham*, that Plaintiff need not prove a Request; for it was traversable, and by not being traversed was admitted. *1 Lev. 166.*

Promise to restore a Horse hired for a Journey, if the Horse dies in the Journey without the Rider's Default, his Promise binds not. *Lisle's Case*, cited in *Matraver's Case*, *Trin. 1651. B. R.*

One brings an *Assumpsit* for 20*l.* and gives in Evidence a Promise, if two would surrender, to pay them 20*l.* a-piece, good. *Mich. 1655. B. R. Thomas and Gery, Style 461.*

Indebit. for 50*l.* brought by *Edgar* against *Cbetham* Clerk. The Evidence was *T.* was indebted to *Edgar* in 50*l.* *Cbetham* desires *Edgar* to let him take the 50*l.* of *T.* and he would give *Edgar* a Bill of Exchange to receive so much at *London*: Accordingly *T.* promises to pay *Cbetham* the Money, which Promise he accepted, and gave a Bill of Exchange to *Edgar*; after *T.* became insolvent; then *Cbetham* prohibits the Payment of his Bill, whereupon this Action is brought. *Per Wadb.*

Wyndham Justice, *Affize Norf. Summer, 1663.* the Action lies; for *Chatham* having accepted the Promise of *T.* and given a Bill, &c. is now become a Debtor to *Edgar*, until his Bill be paid, though he never receives the Money of *Thompson*. This Case, though for another Point, is in *1 Keb. 592.*

In *Indebit.* it is good Evidence against the Father, that Physick was delivered to his Daughter at his Request. *Stonehouse* versus *Bodvil, Hill. 14 Car. 2. B. R. 1 Keb. 439.*

One promises a Bailiff, that if he would let one arrested be in his House that Night, he would deliver him in the Morning; it's a good Promise, and the Bailiff or the Plaintiff may bring the Action. *Benson* vers. *French, Pasch. 15 Car. 2. B. R. 1 Keb. 483. 1 Siderf. 132. 1 Lev. 98.*

Indebitat. The Case was, the Plaintiff sold sixty Comb of Rye to the Defendant at fourteen Shillings *per* Comb, to be delivered before *Michaelmas*; the Plaintiff delivered fifty Comb before the Time, and brought this Action for the Money for it, and good, though it was agreed the Money to be paid on the Delivery of the last Rye. *Per Hale* Chief Baron.

1. Though the Agreement is intire, yet the several Deliveries make several Contracts.

2. Though the Payment was to be on the last Delivery, yet a Time being set for Delivery, it's intended to be paid when the Delivery should have been.

3. The Time being past, it's now a Duty, and so *Indebitatus* lies.

4. The Defendant hath his Remedy for delivering the Residue. *Barker* versus *Sutton, Lent Affize Norf. 1662.*

The

An Account.

The Court would not admit Evidence of an Account current to maintain *Indebitatus*, because it would involve the Court in a tedious Examination; but if the Account had been stated, then *Indebit.* upon the Account is usual. *Keb. 2 Part 781. 1 Mod. 268.*

Indebitatus Assumpsit pro opere, or pro diversis mercimoniis, or pro servitio, or labore, is good, and the Particulars may be given in Evidence: Otherwise of an *Indebitatus* generally, or *pro multis beneficiis, &c.* *Keb. 3 Part 781. Keb. 2 Part 552.*

Indebitatus lies for a Portion after the Jointure settled; so for a thousand Pounds on Promise for so much for every Horshoe-Nail; but the Jury may mitigate Damages. *Ibid.*

A Promise to marry *B.* within three Months, within a Fortnight after they meet, and the Party promises again to marry her within three Weeks, this last Promise is no Discharge of the former, being all within the Time of three Months; but had the last Promise been to marry her within some other Time after the three Months, it had discharged the former. *Hite versus Chaplin, Pasch. 1658. B. R.*

In an *Assumpsit*, the Plaintiff cannot give in Evidence a Specialty to prove his Cause of Action. *Moor 240. Cro Jac. 505.*

Assumpsit on a Contract to pay Money on the Marriage of his Daughter, the Defendant gave in Evidence a Discharge of the Contract. *Hale* held the Defendant ought to have pleaded it, and that it only went in Mitigation of Damages. *2 Lev. 81.*

If a Man be said to assume the 4th of *May*, and he be then proved to be dead, and the Party be proved to assume another Day, it

sufficeth. But if a Man bring *Trespass* against another, and lay it to be done the fourth of *May*, and the Party is proved to be Dead, this discharges the Action; for a personal Action, that complains of a Wrong done, dies with the Person. *Gilb. L. of Evid.* 241, 2.

Case by a Man, and declares, That in Consideration he would marry the Defendant, she would marry him; held a good Consideration; and that on *Non Assumpsit* she might give in Evidence any lawful Impediment; as Consanguinity within the Levitical Degrees, but not a *Præcontract*. *5 Mod.* 411.

If a Citizen of *London* promises his Daughter's Husband to give him a Child's Portion, by the Custom of *London* that is certain enough. *2 Roll. Rep.* 104.

Indebitatus by one, Defendant gives Evidence that another was Partner with the Plaintiff at the Delivery of the Wares; Plaintiff nonsuit. *Franklin versus Walker, Norf. Lent Assize 1667.* *Per Morton contr.* in *Trespass*, for there Jointenancy must be pleaded.

In *Assumpsit* in Fact, and *Non Assumpsit* pleaded, a Release cannot be given in Evidence, unless only to mitigate Damages; but it may upon an *Assumpsit* in Law, to maintain *Non Assumpsit*. *Siderf.* 236.

Indebitatus for 9*l.* Defendant pleaded *Non Assumpsit infra sex annos*, Issue *inde*, the Plaintiff proved a Debt of 9*l.* due ten Years before, and an Acknowledgment of the Debt within six Years, and an Offer to pay 5*l.* for the whole.

Per Hale: The Plaintiff nonsuit; for the Acknowledgment of the Debt is no more than is done by the Plea, but there must be a new Promise

Promise of the Debt within six Years, to make the Action hold, and here the Promise or Offer to pay 5*l.* gives no Action for the 9*l.* *Bass versus Smith, Suffolk, Summer Assize, 1668.*

Non Assumpsit.

In a special Promise to pay 20*l.* if the Plaintiff would pay 10*l.* &c. Upon an Averment that he paid the 10*l.* upon *Non Assumpsit*, the Defendant shall not give in Evidence that the Plaintiff did not pay the 10*l.* neither is the Plaintiff bound to prove it, for the Issue is upon the *Assumpsit*, and not upon the Payment of the 10*l.* which might have been traversed. And although it was said, That in all Actions there is a General Issue to be taken, which shall put all the Declaration in Issue, and that must in this be *Non Assumpsit*, or nothing; yet by the Advice of all the Justices of *Serjeants Inn* in *Fleetstreet*, it was ruled as abovesaid. *Mich. 16 Car. B. R. between Holdich and Brodrig.* I have been the more particular in this, because I have known Plaintiffs nonsuited in such Cases at the Assize for want of proving the Averment: Although I must confess I never agreed with the Judge herein that did it. For it is a Mistake to say, the Plaintiff must in all Cases prove his whole Declaration; if he proves the Matter in Issue, he ought not to be nonsuited. *Roll. Tit. Trial, 681.*

2 Roll. 681.
pl. 6.

Delivery of the Goods is Evidence of the Sale in the *Quantum Meruit*, because they shall be supposed to be delivered on the Bargain, and with Expectation of the Price of them. *Gilb. L. of Evid. 187.*

Indebitatus

Indebitatus Assumpsit for 750*l.* laid out; on *Non Assumpsit* it appeared, that Defendant and another now dead farmed the Excise; that the Money was laid out by Plaintiff on the Behalf of the Defendant and his Partner, and that Defendant promised to repay it out of the first Profits he received; and held the Action not maintained; the Money being laid out for the Partners, and the Promise of Payment not absolute. 2 *Mod.* 279.

Assumpsit in Consideration Plaintiff would forbear his Suit against J. S. for 80*l.* which J. S. owed him, Defendant promised to see him paid; and the Evidence was, that J. S. owed Plaintiff only 40*l.* Held the Plaintiff failed. *Clayton* 111.

Assumpsit, and declared, That *quidam exitus* in Ejectment of the Demise of the Plaintiff *junctus fuit* between the Lessee of the Plaintiff and J. S. Defendant; the now Defendant, in Consideration the Plaintiff would not enforce his Title, but give weak Evidence promised to pay the Plaintiff 270*l.* and avers Performance, and a special Verdict, that the Agreement was made as set out, but that in the Ejectment two Issues were joined; and held a good Verdict for Plaintiff. *Cro. Eliz.* 337.

The Plaintiff took a Distress for Rent; the Defendant promised, if he would redeliver the Distress to him, to pay the Sum demanded for Rent; and an Action being brought on that Promise, held that the Plaintiff must prove the Rent due. *Clayton* 139. *Gower v. Wilkinson.*

Matters that lie in Account are not to be given in Evidence on an *Indebitatus Assumpsit*; *Indeb. Assump. Account.*
per North Chief Justice. *Modern Rep.* 270.

Payment.

1 Mod. 210.

In an Action of *Assumpsit*, grounded upon a Promise in Law, Payment may be given in Evidence, but not where the Action is grounded upon an express Promise.

Promise.

Upon an *Assumpsit*, the Plaintiff declares upon two Considerations, and a simple Promise: If the Jury find but one, or a conditional Promise, this doth not maintain the Issue for the Plaintiff. *Leon. 173. Musted and Hopper's Case.*

In *Indebitatus Assumpsit*, Infancy may be given in Evidence on *Non Assumpsit*.

In *Assumpsit* for Money, and likewise for Money laid out to the Use of the Defendant's Wife *dum sola*; on *Non Assumpsit* pleaded, at the Trial the Defendant offered to give in Evidence the Infancy of the Feme at the Time of the Promise, which the Chief Justice doubting of, it was referred, by Consent, to him as a Case, who consulted with the rest of the Judges; and they all agreed, That upon the General Issue, such Evidence hath been of late admitted. *Darby versus Boucher, Salkeld 279.*

Parol Promise to be performed on a Contingency, is not within the Statute of Frauds, which makes a Promise void, that is not to be performed within a Year.

A parol Promise was made to pay a Sum of Money upon the Return of such a Ship, which Ship happened not to return within two Years Time after the Promise made: It was resolved by all the Judges, That this was a good Promise, and not within that Clause of the Statute of Frauds, which says, *That no Action shall be brought upon an Agreement, that is not to be performed within one Year, unless it be in Writing*, for that there was a Possibility of the Ship's returning within the Year: And that Clause extends only to such Promises, where by express Agreement the Thing is not to be performed within a Year. *Anonymus, Salkeld 280.*

If a Man contracts for Goods, and after carrying them away gives the Seller a Goldsmith's Note for the Money, it does not amount to a Payment; but if it were given at the very Time of the Contract, it would be *prima facie* Evidence, that it was taken in Payment. And if a Man, upon a Contract made before, takes such a Bill, and keeps it till the Party on whom it was drawn becomes Insolvent, in an Action brought by him against the Buyer on that Bill he shall be barred; but he shall recover the Debt upon the original Contract. *Reports in Holt's Time* 298. *Cases W.* 3. 408.

Upon an *Assumpsit*, Covenant under Hand and Seal to pay the Money, is no Evidence, nor is any Specialty or Matter of Record, or any Contract for Rent. *Gilb. Law of Evid.* 182. cites *Cro. Jac.* 506, 598. *Hob.* 284. *Cro. Car.* 343.

In a Declaration on a collateral Promise, it is not necessary to lay, that it was in Writing, but it is sufficient within the Statute of Frauds and Perjuries to prove it was in Writing at the Trial. *T. Jones* 158.

In *Assumpsit* upon a Note for 10 l. 15 s. given by the Defendant to the Plaintiff, and *Non Assumpsit* pleaded; upon Trial the Plaintiff produced and proved the Note. The Defendant in Discharge of himself produced the Record of a Foreign Attachment, wherein the said Debt was discharged by the City Process, for the Satisfaction of a Debt demanded there of the Plaintiff, and was there condemned: And it was ruled by *Trevor C. J.* That this was a good Discharge, but that if the Plaintiff in this Action could have shewed the Original wherein

Record of a foreign Attachment produced to discharge the Defendant in *Assumpsit* upon a Note.

wherein he declared to be precedent to that Attachment, so that it had appeared, that this Court was possessed of an Action for the Demand of this Debt before it was attached, then should the Plaintiff have recovered his Debt notwithstanding such Evidence; but the Declaration in the Record here was betwixt the Time of the Attachment and of the Condemnation. *Savage's Case, Salkeld 291.*

Where upon
Non Assumpsit
Condemna-
tion in foreign
Attachment
may be given
in Evidence,
and where it
must be plead-
ed.

In *Assumpsit* Evidence was given, That the Debt was attached by the Custom of *London* before the Action brought, and Condemnation had before the Plea pleaded. And it was urged, That this should relate to defeat the Action. But *per Cur.* it was ruled, That if an Attachment and Condemnation be before the Writ purchased, it may be given in Evidence on the General Issue, because that is an Alteration of the Property before the Action brought; but if the Attachment only be before the Writ purchased, it ought to be pleaded in Abatement of the Writ; and if the Condemnation be after the Action commenced, and the Plea pleaded, then it may be pleaded in Bar, but shall not be given in Evidence on *Non Assumpsit*, for that the Property is not altered until Condemnation, and the Plaintiff had a Verdict. *Brook versus Smith, Salkeld 180.*

Assumpsit on a Bill of Exchange; Defendant pleads that he was a Gentleman that went Abroad to travel, and traverses his being a Merchant. The Plaintiff demurred; and it was insisted, that it amounted to the General Issue; but held that it was no Rule, that a Matter, that might be given in Evidence on the General Issue, could not be pleaded specially; that in Debt for Rent, Entry, and Expulsion may be

be given in Evidence on *Nil debet*, and so on *Nil habuit in Tenementis*, but yet are always allowed to be pleaded; but the Plea was held ill in Substance, being the Drawing the Bill made him a Trader. 2 Vent. 295. And so in Debt on Bond against a Feme Covert, she may plead Coverture, or give it in Evidence on *Non est factum*. 5 Mod. 175.

Winner shall not recover on a Bill for Money won at play against an Acceptor; otherwise of an Indorsee. 1 Salk. 344. See 5 Mod. 170. Carth. 356. Holt 328. Cas. B. R. 96. Skin. 195.

Quarto Jacobi secundi, An Assumpsit was brought against four, who pleaded *Non Assumpser. infra sex Annos*, and the Verdict was, that one of them did assume *infra sex Annos*, and the other *Non Assumpser*. And it was held that no Judgment could be given against the Defendant, upon whom the Verdict was found; for this is an *Indebitatus Assumpsit* for Goods sold; and 'tis an intire Contract, and they must all be found to promise, or else 'tis against the Plaintiff. 2 Vent. 151.

Where the Contract is intire, what Proof is requisite.

Torts are in their Nature several; so one Defendant may be found guilty, and the other not guilty, but 'tis not so in Actions grounded upon Contract. 2 Vent. 151.

Torts may be found severally.

Case on a promissory Note against the Drawer; held, that by Stat. 3 An. c. 9. the Note is Evidence of a Consideration, but not conclusive Evidence, but turns the Proof on the Defendant, to shew that there was no Consideration given for such a Note; so held by the Lord Chancellor King. Gilbert's Reports 154. M. 8 G. 1. *Brown v. Marsh*.

Action against an Indorser of a Bill of Exchange, Drawer called to prove that he did not draw the Bill; but held he was not a Witness; but the Party gave him a Release, and that was sufficient. *Reports in Holt's Time* 297.

Assumpsit against four for Corn sold to them; the Evidence proved the Sale to be to only two of them. Held that Plaintiff failed as to all. *Clayton* 114.

Of Evidence in Debt.

Non est factum.

Upon *Non est factum*, it is no Evidence to shew that the Bond was made upon an usurious Contract, or that the Sheriff's Name is mistaken, &c. in a Bail-Bond; or that the Bond is joint or several, or delivered at another Place; or that it is void by Statute, but it must be pleaded in Abatement. 1 *Inst.* 283. *Hob.* 72.

5 Coke 27.
Roll. Trial,
683. pl. 8.

1 Cro. 120.
Owen 8.

But to prove that the Seal was broken off, and put on again; or to prove a Rasure of the Deed, delivered as an Escrow, &c. this is good Evidence, *Lib.* 5. 119. 11. 27. if it were done before the Action brought; but if the Seal was broke off, &c. by Chance, after Issue joined, the Jury may find it specially.

If an Obligation is delivered to the Use of another, and he disagrees to it, by this the obligation has no Force, and he can never agree to it afterwards, and therefore this is no Deed, and may be given in Evidence on *non est factum*. *Gilb. L. of Evid.* 162.

If Witness prove Delivery at another Place: 2. If that warrants the Issue. *Ibid.*

Debt on Bond, which was set forth to be made 15 November 25 Eliz. and on *Non est factum*,

factum, the Fact appeared to be, that it was dated 15 November 25 Eliz. but was delivered 18 November 26 Eliz. Held the Bond was proved. *Cro. Jac.* 136.

On *Non est factum*, the being delivered as an Escrow may be given in Evidence, as well as Suspension of Rent, on *Nil debet*. 3 Keb. 142.

It was held by Holt, C. J. That the Pleading specially a Rasure or Delivery as an Escrow, and *sic non est factum*, was impertinent, for thereby the Defendant takes the Proof on himself; but on a general *Non est factum* the Plaintiff must prove whatever is necessary to make it a Deed. 6 Mod. 218.

In Debt upon an Escape, if the Defendant Escape. plead *Nul Escape*, he cannot give in Evidence no Arrest.

Debt on a Bond to perform Covenants to deliver Possession at the Term's End to the Lessor or his Assigns; Breach was assigned in not Delivery to two Purchasers, Demand being made by both, and Issue joined thereon; in Evidence, Demand by one is good. 2 Cro. 475.

In Debt upon a Contract, that the Contract was conditional; upon Account, that there was no such Account; *Ne lessa pas* upon *Nil debet* in Debt for Rent.

In Debt upon the Statute of 21 H. 8. of Farms, upon the General Issue *Non habuit*, he may give in Evidence the Taking for the Provision of his House, according to the Provision of that Statute. 27 H. 8. 21.

Debt on Bond to perform an Award, *ita quod* the Award be delivered to the Parties; in Evidence Delivery proved to the Wife is sufficient

ficient for the Jury to presume the Delivery to the Party himself. *Per Hale, Norfolk Summer Assizes, 1665. Trice and Prat.*

At the same Assizes, *per Moreton Justice*, Delivery to the Party's Son is good Evidence. *Violet and Cook.*

Debt against an Heir, &c. *Riens per descent, &c.* a Feoffment given in Evidence made before the Action, that it was fraudulent may be given in Evidence, though not pleaded. *5 Rep. Co. Gooche's Case, 60 Hob. 72. Vide Fitz. Tit. Garranty 88.*

Debt against Executor, who pleaded *Ne unques, &c.* Plaintiff replied, That he administrated as Executor, and gave in Evidence Administration granted to him, by which he administrated; good. *Dyer 305.* But a Gift of the Goods the Defendant may give in Evidence.

In Debt against Executors, and *Plene administravit* pleaded, the Defendant cannot give in Evidence a Bond satisfied, where the Executor and Testator were Obligors. *Per Coventry Lord Keeper, 23 Jac. Perkins versus Perkins.*

In Debt for Tithes, *Modus* to a Vicar is good against the Parson, and so is a *Modus* to a Parish Clerk. *Per Moreton Justice, Lent, Cambridge, 1667. Barber versus Cofier.*

In Debt against Executor *de son tort*, who pleads *Ne unques, &c.* it is sufficient to charge him, by proving he hath administrated of never so little Value. *Clayton 6.*

Debt on Bond against Executor *de son tort*, who pleaded Fully administrated; the Evidence was, the Intestate made a Bill of Sale of his Goods to the Defendant; who was bound with him in a Bond as Surety, for his Countersecurity, but the Goods remained in the Intestate's

state's Possession during his Life, for some few Hours; ruled a fraudulent Deed by *Barkley* Justice, at *York*. 11 *Car.* *Legard* and *Binly*, *Clayton* 39. *Quære*.

Debt against Administrator, who pleaded *Plene, &c.* and gave in Evidence Judgments, and good without pleading; *per Henden*, 1638. *York*, *Clayton* 95. *Quære*, for if Judgments be kept on Foot by Fraud, and given in Evidence, how can a Creditor, who sues for a just Debt, be prepared to detect this Fraud? And *Note*; In *Scire facias* against an Executor on Judgment *per Testator*, the Defendant pleaded Fully administred generally, and the Plaintiff demurred specially; and Sir *William Jones* Solicitor General moved to amend the Plea; and *Hale* Chief Justice thought he ought to plead specially, how fully administred. *Bradford* versus *Hutchinson*, *H.* 25, 26 *Car.* 2. *B. R.*

If the Defendant pleads *Plene, &c.* *præter* Judgments, &c. The Plaintiff must prove Assets above the Sum of those Judgments. *Huntington*, by Judge *Wyndham*, 33 *Car.* 2.

Debt for Rent on a Lease; the Evidence to prove the Lease was, That Plaintiff leased a House to Defendant at a Rent, but no Time mentioned; and it was agreed at the same Time, that the Lessee was not to leave it without Half a Year's Warning. *Per Hale*, *Norfolk*. *Summer Assize*, 1668. It is a Lease at Will, and the Leaving on Half a Year's Warning, is but a collateral Agreement, and no Part of the Demise.

In Debt for Rent upon a Lease, and *Nil debet* pleaded, *Ne unques seisie des Terres* is good Evidence; otherwise upon the Plea of *Riens arrere*, or *Levy per Distress*. 2 *Roll. Abr.* 677. pl. 21.

Upon a General Issue, you may give Special Matter in Evidence. If you give Colour, you may plead it specially; as in Debt for Rent, you may plead *Nil debet*, and give Release in Evidence; per Holt Ch. J. 12 W. 3. in Case of *Paramour v. Johnson*, cites *Vin. Abr. Title Evidence*, 76. pl. 72. 12 Mod. 412. Ld. Raym. 566. S. C. and S. P.

Eviction, Expulsion, and any Suspension of Rent, is good Evidence upon *Nil debet*, for that amounts to discharge and falsify in the Case of Complaint, for then there was no pernancy of the Profits whereby I could become Debtor to him in Reversion, and so the Act *in Pais* is discharged, which goes of necessity to the creating of this Debt, though others have held it ought to be pleaded. *Gilb. L. of Evid.* 282.

Debt for
Rent.
Dyer 122.

In Debt for Rent upon *Non dimisit*, that the Lessor *riens avoit* in the Land at the Time of the Demise, may be given in Evidence.

So upon *Nil debet* an Eviction may be given in Evidence. If the Lessor enter into Part, the whole Rent is suspended; but if a Stranger evict the Lessee of Part of the Land, the Rent must be apportioned.

2 Roll. 641.
pl. 4.

In Escape of a Prisoner, and the Issue is, If the Gaoler immediately after the Escape made fresh Suit; if the Prisoner hath escaped a Day and a Night before the Gaoler knew it, and then he makes fresh Suit, it is sufficient to prove the Effect of the Issue, for convenient Pursuit is immediate fresh Suit in Law.

Fresh Suit.
Escape.
The Writ,
the Warrant,
Arrest and
Escape are
to be proved
in an Escape.

In Escape against the Marshal, the Plaintiff must prove the Person that escaped in actual Custody since the *Committitur*, which *Committitur* either in the Marshal's Book, or on Record,

cord, is not sufficient, without a Proof of being in actual Custody since. *Keb. 1 Vol. 375, 775.* See *Keb. 2 Part 384.* What may be given in Evidence upon an Information of negligent Escape, against the Marshal of the King's Bench, as a Recovery in the Original Action, and the Plaintiff allowed a Witness, because he neither gains nor loses.

So upon *Riens per discent*, by an Heir in Debt upon an Obligation, that the Defendant aliened the Assets by Fraud and Covin, and so void by the Statute of 13 *Eliz.* may be given in Evidence, because these are the General Issues. 2 *Roll. 684. pl. 4.*

In Debt against the Heir who pleads *Riens per discent*, Proof that the Father was seised, and that the Heir did enter after his Death, is well enough, for it shall be presumed Fee-simple till the contrary be shewn.

In Debt for Tithes, if the Plaintiff declares that he is Proprietor of a Farm, it is sufficient, and may give his Title in Evidence.

Entry and Suspension may be given in Evidence upon *Nil debet* pleaded. *Mod. Rep. 35. per Twisden, Brown's Case, 1 Vent. 258.*

Fresh Suit may be given in Evidence in an Escape. Action of Debt for an Escape, on *Nil debet* pleaded; per *Hale* and *Wild contra Twisden.* *Hale* said, he always allowed it, and so said *Wild* Justice. *Mod. Rep. 116. Mosdale's Case.*

Upon a Trial at Bar it was agreed, That in Debt upon an Escape, and *Nil debet* pleaded, Reprisal upon fresh Suit may be given in Evidence by the Defendant in Excuse of the Action.

Non est factum.

Upon *Non est factum*, you may give *Not lettered* in Evidence; for when the Person who delivered the Deed is unlearned, and the Deed is read and expounded to him in another Sense than that which the Deed really contains, then did not the Party agree to the written Deed, 'tis not the Expression of his Mind, nor to be accounted his Deed. *Gilb. Law of Evid.* 162. But it is the best Way to plead it, for the Understanding of the Jury. 39 H. 6. 9. *Bro. Waiver*, 2.

Debt on single Bill, on *Non est factum*; one of the subscribing Witnesses fully proved the Executing of it: The Defendant produced a Witness of the same Name and Surname as the other subscribing Witness; who swore the Name was like his, but was not his, and that he never knew either of the Parties, or the other Witness; neither could the other Witness say he was the Man. And *Holt Ch. J.* ordered them to write their Names, and left it to the Jury, who found for Plaintiff. 6 *Mod.* 167.

Debt on Bond against two; on *Non est factum* if it appears to be only the Bond of one, the Plaintiff fails. 40 *E.* 3. 35. *b.*

If two Men are bound in a Bond jointly, and one is sued alone, he may plead this Matter in Abatement; but cannot plead *Non est factum*; for it is his Deed, though it be not his sole Deed. 5 *Co.* 119. 1 *Inst.* 283. *a.*

In Debt against two, if it be proved the Debt of one, and not of the other, the Issue of *Non est factum* is maintained. *Gilb. Law of Evid.* 162, 163.

Debt

Debt on Bond by J. S. against St. John and Alice his Wife, as Heir of her Father; and on *Non est factum* it appeared the Bond was made to J. S. and another; and held that the Plaintiff could not recover; but the Plaintiff ought to have declared as Survivor of the other. 1 Leon. 322. *Sed vide Aleyn 41. Houlditch versus Case*, the contrary is held, and that it ought to be pleaded in Abatement; and so in *Savile 92*.

One William Shotbolt was bound in a Bond to J. S. but was named John in the Bond; and the Plaintiff sued him by the Name of William Shotbolt, alias dict' John Shotbolt; and on *Non est factum* this Special Matter was found; held that the Plaintiff failed; for he ought to have sued him by the Name of John. *Dyer 279. b.*

Evidence that the Party was blind, and the Deed mis-read to him, will justify this Issue of *Non est Factum*. *Gilb. Law of Evid. 164.*

On *Non est factum* a Rasure cannot be given in Evidence, because it was once his Deed, but avoided by a subsequent Fact. *Mod. 66.*

On *Non est factum* it was found, that the Defendant sealed the Bond and left it on the Table, and the Plaintiff came, and took it up and carried it away; held this did not amount to a Delivery. *Owen 95.* But if the Defendant had at that Time said, *This will serve*, that would amount to a Delivery. 1 Leon 140. *Dyer 192. b.*

If a Man Seals an Obligation, and commands another to keep it till certain Conditions are performed, and the Bond is delivered to the Obligee before they are performed, this could never be his Bond till those Conditions were performed,

Debt for
Rent.

formed, and therefore this Special Matter may be given in Evidence to prove *Non est factum*. *Gilb. Law of Evid.* 162.

In Debt for Rent upon a Lease for Years, the Issue being joined, if the Rent was paid or not, the Defendant gave in Evidence for Part of the Rent, that the Plaintiff was by Covenant to repair the House, and did it not; and thereupon he expended the Rent in repairing the House; and the Question was, if this Evidence will maintain the Issue? *Gaudy* conceived it did, for the Law giveth this Liberty to this Lessee to expend the Rent in Reparations, and recoup the Rent. *V. 12 H. 8. 1. Fitz. Tit. Bar. 242. 14 H. 4. 27. Fenner*: It is no Evidence, for if the Lessor will not repair it, the Lessee may have his Covenant against him. *Clench* thought he might well expend the Rent in Reparations, but he ought to have pleaded it, and cannot give it in Evidence upon the General Issue; and thereupon they moved the Jury to find the Special Matter. *1 Cro. 222.*

So that it seemed to the Justices, That the Defendant had Liberty to expend the Rent in the Reparations (they being to be done at the Plaintiff's Cost); but then that he ought to have pleaded this Matter, as it was done in (almost) the like Case, *Fitz. Tit. Bar. 242.* Yet why might he not give it in Evidence upon the General Issue? For if the Law allows this to amount to a Payment of the Rent, then the Defendant owes nothing, which maintains *Nil debet*; and I think the other Book of *14 H. 4. 27.* rejects this Sort of Special Plea, upon this Reason, that the Plea amounted to a General Issue; but there indeed the Rent was

was pleaded to be laid out at the Plaintiff's Command, here only by Authority in Law. I should be glad if any one would reconcile those two Books better. I know there is another Reason in the Book (and assigned by *Rolle* in his Abridgment of the Case) why the Plea was rejected, *viz.* That the Duty was acknowledged by the Plea, and therefore the Matter of the Plea not good, without shewing a Deed of it; but I should have been better pleased with him, if he had assigned the other Reason, *viz.* That it amounted to the General Issue. Which made *Cheyne* that he durst not join in Demurrer: For it is not pretended in either Case, that the Deed ordered the Rent to be laid out in the Repairs.

And in that Case in *F.* where there was no exprefs Order of the Plaintiff; it may be the Judges allowed the special Matter to be pleaded, because the Jury should not be intrusted with the Law upon the General Issue, which may be said for the special pleading this Matter in our Case, although it may amount to the General Issue.

But as to the Residue, the Defendant shewed he paid it to others, by the Plaintiff's Order, which was held clearly good, for what is paid by the Lessor's Appointment, is a Payment to himself. *Cro. Eliz.* 223. *Taylor* against *Beal*. *Vide Roll. Tit. Debt*, 605. 34 *H.* 6. 17. *Bro. Debt*, 27.

Reparations,
Vide the Cases
of Recouper,
Lib. 5. 30.

Debt for Rent on a Lease, the Defendant pleaded Payment; and on Evidence proved Payment to the Sequestrators of the Common Wealth, the Plaintiff being a Delinquent; and held the Issue was proved. *Clayton* 129.

In

Debt for Ser-
vants Wages.

In Debt for Servant's Wages, viz. 20 s. or a Robe yearly: The Defendant may plead Payment of the Robe, and shall not be put to the General Issue, where the Payment is of another Thing than Money; but of Money he must plead *Nil debet*, and give the Payment in Evidence. And the Defendant may plead that the Plaintiff departed out of his Service, and shall not be forced to the General Issue. 9 E. 4. 36. Though surely that may be given in Evidence upon *Nil debet*, for the Plaintiff must prove he served: So *Indebitatus Assumpsit*, and *non Assumpsit*, upon the Promise in Law, an Extinguishment by taking a Bond (being a Matter of a higher Nature) for the Debt, may be given in Evidence.

Extinguish-
ment.

And Note; If an Infant buy Goods, and afterwards give a Bond, and this Bond be avoided by Infancy, yet it seems the Contract shall not be revived. *Sed dubitatur*, Roll. Tit. *Extinguishment*, 604. For now this Bond which was voidable, is become void, and a void Thing shall not have such Effect: But a Personal Action once suspended is gone for ever; but Acceptance of a Bond shall not extinguish Rent, nor Arrearages of an Account, before an Auditor of Record, because these are of a higher Nature than the Bond, the Rent being real, and the other of Record. But the Bond extinguishes the Contract for the Arrearages upon an *Insimul computasset*, &c.

Acceptance.
Rent.

Acceptance of Rent due the last Day, and an Acquittance thereof discharges all the Arrearages due before, *Lib. 3. 65*. Unity of Possession in as high an Estate destroys the Prescription, &c.

In

In Debt upon a Bond, conditioned to pay Payment.

205. at the House of the Defendant the 7th Day of *May*; upon a Plea of Payment at the Time and Place, the Jury found the Payment before the seventh Day, and prayed the Advice of the Court, if this was a Payment at the Day. The Court adjudged that the Payment and Acceptance before the Day, was as well as if it had been paid at the Day. *Savil's Reports* 96. Bond against *Richardson*. And so says *Coke 1 Inst.* 212. The Time and Place are but Circumstances, and if the Obligee or Feoffee receive the Money at another Place, or before the Day, it is sufficient; or a lesser Sum before the Day. But *Moor* 47. Upon Issue of Payment at the Day and Place, and Evidence of Payment a Month before, and Demurrer upon the Evidence, *Dyer*, *Brown* and *Wells* said this Evidence doth not maintain the Issue, because before the Day of Payment there is no Duty, and the Day and Place are Parcel of the Issue, and the Act on one Day is not an Act done on another Day: As if an Executor pleads Payment at the Day, it is not good Evidence to shew that it was paid before the Day by the Testator, for this doth not prove the Issue, and yet there was not any Duty remaining at the Day, and therefore the Pleading ought to have been specially according to the Truth. *Vide devant* ——— And it is not like the Case, where the Circumstances of Time and Place are only for Necessity of Trial; but in Regard that Payment is the Substance, why is it not sufficient to prove, as well as to find, the Effect and Substance of the Issue? And it is not like the Case of collateral Conditions, where the Con-

1 Cro. 142.

1 Anderson

198.

Owen 45.

dition is not to pay Money, but to do some collateral Thing, as to deliver a Horse, a Robe or Ring, &c. or to pay Money to a Stranger; such collateral Conditions are more strictly to be observed. *Vide 1 Inst. 212.*

Where pleading *Plene administravit* admits the Debt.

Ruled *per Holt Ch. J.* That in Debt *Plene administravit* admits the Debt; but otherwise in an Action on the Case, or in an *Indebitatus assumpsit*, for there the Plaintiff must prove the Debt; and in Proof of a *Plene administravit*, if the Action be Debt on a Bond, and you offer Payment of the Bond, on *Plene administravit*, Proof must be, it was a Debt by Bond, that it was sealed and delivered: But to Debt on simple Contract, you need only prove Payment, because if no Bond, it is a good Administration in that Action. *Saunderson versus Nicholls, Shower 81.*

Where Sealing and Delivery of the Bond paid, must be proved.

It was adjudged *per Holt Ch. J.* That in Debt for Rent, upon *Nil debet* pleaded, the Statute of Limitations may be given in Evidence, for the Statute has made it no Debt at the Time of the Plea pleaded, the Words of which are in the present Tense; but in Case on *Non assumpsit*, the Statute of Limitations cannot be given in Evidence, for it speaks of a Time past, and relates to the Time of making the Promise, at *Nisi prius* at *Hertford, 1690. Anon', 1 Salk. 278.*

Levy by Distress, & *sic non debet*, Payment or Release is good Evidence, otherwise of Rasure.

In Debt for Rent, if the Defendant plead Levy by Distress, & *sic non debet*, a Release or Payment is good Evidence, for it proves there is no Debt, and that is the Issue; *vide Cro. Eliz. 140.* which agrees: But if the Defendant plead Rasure, and *sic non est factum*, nothing else is Evidence but Rasure. *Per Holt Ch. J. Galway versus Susach, Salk. 284.*

Per

Per Holt Ch. J. In Debt the Defendant may A Release plead a Release, because it admits the Contract, which is a Colour of Action, and yet he might give it in Evidence upon *Nil debet*. So in *Assumpsit*, the Defendant may plead Payment, because it admits the *Assumpsit*, and yet he may give it in Evidence upon *Non Assumpsit*. *Hutton versus Mors*, *Salk.* 394.

It was held by *Holt Ch. J.* That if a Bond was of twenty Years standing, and no Demand proved, or good Cause of so long Forbearance shewn, he would intend it paid, on *solvit ad diem*, and *a fortiori* in Case of a Note. *6 Mod.* 22.

Debt on a Bond by an Administrator, Defendant pleaded *solvit ad diem*, and insisted on the Bond's being dated 9 *W.* 3. To encounter which, the Plaintiff shewed an Endorsement, wrote in the Intestate's own Hand, of the Payment of one Year's Interest nine Years after the Bond made. *Pratt Ch. J.* refused this Evidence at *Nisi prius*; and on a Case made, the other Judges were of Opinion, it ought to have been allowed as Evidence; but the Chief Justice continued in his former Opinion. *T. 10 Geo. 1. Serle versus Barrington, Mod. Cases in Law and Equity* 278.

Dower.

In Dower, the Issue was *Ne unques seisie que Dower*, and for the Plaintiff, a Feoffment in Fee was given in Evidence to the Husband; the Defendant would have given in Evidence, a Seisin in Tail with a Discontinuance, and then the Feoffment, &c. and so a Remitter, but it ought

ought to be pleaded; *per Cur^o. Dyer 41.* Nor an Estate upon Condition.

If an Heir mortgage for Years, and then assign Dower legally, *i. e.* a third Part of the whole, the Assignment shall bind the Mortgagee; *contra*, if the Assignment be illegal, as of one whole Manor, when there were three Manors; that being not as the Law would have done it. And if a Disseisor assign a legal Dower, it is good: But if the Heir mortgage in Fee, and then assign, &c. legally, &c. that is not good, because the whole Freehold was out of him at the Time of the Assignment. *Per Hugh Wyndham Just. Bucks, Lent Assizes 1668.*

Dower.

Dower of Rent, *Til. Ne unque seise que Dower la, &c.* Horton J. S. granted the Rent to the Husband, payable at *Michaelmas* next, and the Husband died before the Day, and so he was seized in Law, and demanded Judgment. *Thirning*: You shall say generally, *quod seise que Dower la, &c.* and give our Case in Evidence, & *sic bene*, notwithstanding the Doubt of the *lay Gens*, for they ought to credit the Law, and Evidence is not to be pleaded.

11 H. 4. 88.

Ejectment.

In Ejectment the Plaintiff made Title by Title Recovered a Recovery in Dower, and produced in Evidence the Record of the Judgment, the *Habere* Defendant offered to prove *facias seisinam, &c.* The Defendant offered to prove a Term of ninety-nine Years subsisting, Years prior to and that prior to this Title; but it was disallowed; for if he had pleaded this in Bar of the Writ of Dower, yet the Plaintiff must have recovered with a *Cesset Executio*; and the Defendant had a proper Time to have pleaded it then, and has slipped his Opportunity: Also a

Chattel

Chattel Interest was at Common Law bound by a Recovery in a real Action, so that the Demandant had an immediate Execution, without Regard to the subsisting Term: And tho' by the Statute *H. 8.* a Termor may falsify, yet it must be the Termor himself, and not another for him. *Lady Dowager Lindsay versus Lord Lindsay, Salk. 291.*

Of Evidence in Ejectment.

If a Lessee assign or make a Lease to another, the second Lessee must prove the Possession of the first. *Gilb. Law of Evid. 230, 231.*

The Trustee of a Lease, Lessor in Ejectment, by his Disclaimer in *Pais* will avoid the Plaintiff's Title. *Ibid. 231.*

The Plaintiff counts of a joint Lease made by *A.* and *B.* In Evidence it appeared that *A.* *B.* and *C.* were Joint-tenants, that *C.* leased to *B.* and that *A.* and *B.* leased to the Plaintiff; by three Justices against two, it is good. 2 *Cro. Jordan's Case, f. 83.*

Ne dona pas may be maintained by a Demise; and upon a Feoffment, a Lease and Release; but a Fine and Release will not maintain a Demise to Husband and Wife.

When he that sued an *Elegit* brings an *E- Elegit*.
jectment to try the Title, he must in Evidence shew the *Elegit* filed.

Count of a joint Lease made by two; in Evidence it appears they were Tenants in Common; by three Justices against one, it is good. 2 *Cro. 166. Mantle's Case.*

Count of a Lease by Husband, Evidence was a Lease by Husband and Wife with Letter of Attorney to make Livery, and it is made

made in Name of both; by three Justices against one it is good, for Livery as to the Feme was void. 2 Cro. Gardner's Case.

Of a Lease made 5 *Maii* 10 *Regis*, *habendum* from *Lady-day* last past, for 21 Years *extunc prox' sequent'*. In Evidence, a Lease of 5 *Maii* 10 *Regis*, *habendum* from *Lady-day* last past, for twenty-one Years next following the Date of the said Indenture, adjudged good, and affirmed in Error. *Hob.* 19.

Ejectment of a Rectory, Evidence of the taking of Tithes only, and not entering into the Glebe, the Plaintiff was nonsuit. *Latch* 62. *Hems and Stroud.* 2 *Sid.* 91. *Gilb. Law of Evid.* 225.

In Ejectment, the Lease of a Guardian or Copyholder will maintain a Declaration, tho' void against the Lord and Infant; but a Lease *de Herbage* will not of Meadow. *Hardr. Rep.* 330.

In Ejectment, a Lease to *A.* of Lands in the Possession of three Tenants for Years, was delivered to *J. S.* as an *Escrow*, with Letter of Attorney to enter into all, and then to deliver the Deed, &c. Evidence, that the Attorney entered upon one Lessee in the Name of all, and delivered the Deed, &c. *Per Jones* Justice, It is good enough, for where the Freehold is in one, his Entry into one Lessee for Years in Name of the rest is good. *Latch* 71. *Dame Argol's Case.*

In Ejectment the Defendant shall not give in Evidence a former Mortgage or Conveyance made by himself, and therefore in such Cases it is left for him that has the former Mortgage to get himself made Defendant before the Cause comes to Trial.

Ejectment,

Ejectment of Tithes; a Lease for Life of Tithes is good, if there be Church or Church-yard to make Livery in; resolved on Trial at Bar. *Wheeler versus Hancher*, Hill. 14, 15 Car. 2. *B. R. Jones Rep.* 321, 322.

Entry and Claim made upon the Land, within five Years after the Death of the Baron of the Countess of *Peterborough*, to avoid a Fine, she being Issue in Tail, proved by one Witness, and allowed at a Trial at Bar. *B. R. Mich.* 15 Car. 2. *Floyd and Pollard*, 1 Keb. 620.

Custom of Copyholders *in extremis* to surrender into one Tenant's Hands, in the Presence of credible Witness. A surrender was made accordingly, but pleaded to be done to another Tenant, yet being proved to be done to a Tenant it was holden, by *Wadham Wyndham* Justice, to be good; and by him, a Glove or a Turf is a Rod to give Seisin by. *May's Case*, *Norf. Summer Assizes* 1663.

A Will under which Title to Land is made, must be shewn itself, and the Probate is not sufficient. *Contra*, if it were on a Circumstance, or as Inducement, or that the Will remain in Chancery, or other Court, by special Order of such Court. *Eden versus Chalkhill*, *Mich.* 13 Car. 2. *B. R. Keb.* 1 Part 117.

Also Inrolment of a Deed, which needs no Inrolment, is no Evidence. *Ibid.*

He must prove Admission, Institution and Induction, his Reading and Subscribing the Articles, &c. and his Declaration in the Church of his free and full Assent and Consent to all those Things contained in the Common Prayer; and this ought to be proved done within the Time limited by the Statute.

How a Parson in Ejectment of a Rectory shall make out his Title.

but need not shew a Right in him that presented him. *Post.* 525.

See *Keb.* 2 Part 484. In Evidence an Institution without Presentation or Copy of it, was refused by the Court, albeit a Presentation may be made by Parol, but Proof must be made of it; if there be Induction upon it, I think it good Evidence.

The Issue was Fine uncertain, or certain two Years Rent and no more, the Evidence was of Admittances on Surrenders uncertain, but all under two Years Rent. *Per Williams* Justice: You ought to produce Fines on Descent, and Fines paid above two Years Rents. 2 *Bulst.* 32. *Allen versus Abraham.*

A Lease was made by Parol, and agreed to be put in Writing, and Indentures bespoke; but being held for ten Years, and no Indentures executed, it was ruled for a Lease Parol. *Per Berkley* Justice, 13 *Car.* 1. *York, Clayton* 53.

By Justice *Berkley* (1638. *York, Hedges* cont. *Clayton* 57.) A Will under Seal, proved, examined by the Original, was allowed good Evidence. *Quere*; I think the Practice against it.

A Lease and Release were given in Evidence to intitle the Plaintiff, and they both were named *hec Indentura*, but were not indented: Good, *Per Hale* Chief Baron, *Norf. Summer Assizes* 1668. *Briant versus Trendle.*

After Default (in Ejectment) the Defendant may confess Lease, Entry and Ouster, and may give Evidence, and have all Advantages (except Challenges); and if the Plaintiff becomes nonsuit, any one for the Defendant may pray it be recorded.

Per

Per H. Wyndham Justice, Bucks, Lent. 68.
Dr. Crawley's Case. Deprivation in Spiritual Court for Simony, disables from bringing Ejectment, because he can make no Lease; yet *quere.*

If a Mortgagor continues in Possession without Provision for that Purpose in the Deed, he is Tenant at Will; and if he levies a Fine, it is no Disseisin by him continued in Possession still, because after the Will determined, he is Tenant at Sufferance. *Per Hale Chief Baron, Bedford Summer Assizes 1669.*

In Ejectment, the Defendant shall not give in Evidence a former Mortgage or Contract made by himself. *Gilb. Law of Evid. 231.*

Declaration on a Lease made 14 January 30 Eliz. Evidence of a Lease sealed 13 Jan. good, for if it was a Lease thirteen, it was a Lease made fourteen. 4 Leon. 14.

If the Declaration in Ejectment be of *Michaelmas* Term, which relates to the first Day of the Term, yet it is Matter of Evidence, and examinable what Day the Bill was filed; and if it was after the Day of the Lease, all is well. *Sid. 432.*

Feoffments of forty Years standing, and Possession going accordingly, you need not prove Livery, it may be intended *per Jury.* *Roll. Rep. 132.*

If on Not guilty pleaded the Lessor of the Plaintiff shew a Feoffment, the Defendant may give Covin in Evidence. *Gilb. Law of Evid. 233.*

But if the Feoffee by Covin pleads, that he was seised at the Time of the Judgment by Virtue of a Feoffment, and the Creditor, that

he was not seised, on this Issue the Covin may be given in Evidence. *Ibid.* 234.

If the Heir pleads *Riens per Descent*, and gives a Feoffment in Evidence, the Plaintiff may give Covin in Evidence. *Ibid.* 234, 5.

The common Rock on which so many have split, is laying the Lease to be *a die datus*, and the Entry the same Day, which is a Disseisin, not purged by the Commencement of the Lease; for where an Interest passes, is exclusive, and so the Entry the same Day is before the Lease was to commence, and is a Disseisin, but in Cases of Obligation where no Interest passes, it is *contra*; *quod nota*. See *Gilb. L. of Evid.* 225.

Ejectione firmæ, and declared of a Lease by Indenture, bearing Date 6 December 19 Jac. *Habendum à die datus Indenturæ præd.* On Not guilty, the Lease produced was dated 6 December 19 Jac. *habendum à tempore confectiois Indenturæ*; and the Plaintiff was nonsuited, the Lease proved being different from that he declared on. *Cro. Jac.* 647.

Pasch. 27
Car. 2. in
B. R.
— *versus*
Cotewell.

In Ejectione, upon Not guilty, upon Evidence to the Jury at the Bar, the Case was such, That *Cotewell* had a Lease for Years of the Prebend of *Sutton Regis* in the County of *Bucks*, made in the Time of *H. 8.* and being expired, he now claimeth under a Lease from a nominal Prebendary thereof founded in the Cathedral of *Lincoln*: But the Plaintiff claimed by Letters Patent thereof from King *James*, made the 7th of King *James*, to *Brent* and his Heirs, who granted the same to the Widow of Sir *W. Rawleigh* and her Heirs, whose Daughter and Heir Sir *Jervis Elwas* married; and the Possession was according to this Grant:
Whereupon

Whereupon the Question was, If they ought to shew how it came to the Crown? *Hale* Chief Justice said, That by the Statute for Confirmation of Patents, *Temp. Jac.* that Prebend did come to the King. And in *Edw. 1st's* Time was a Device, that all that claimed *Terra Regis* should shew how it came to the Crown, which often vanished away. And in the late Times, in a Trial at this Bar, Mr. *Latch* did nonsuit the Plaintiff upon the Claim of Monastery Lands, although he proved the House had it, because he did not make out how it came to the House; but since that Time the Court have intended it well come to the House, the Possession having went accordingly with it: And he said he was of Counsel in a Trial at Bar for an Impropriation, where it was insisted it was presentative until *Edw. 4th's* Time, and could not be appropriated without the King's Licence, *quod Curia concessit*, and he could not produce the Licence, yet because it was enjoyed ever since *Edw. 4th's* Time as appropriate, the Court did intend a Licence, and that the Patent was lost before the Enrolment; and accordingly the Verdict went then. The Defendant offered to read a Copy of a Lease out of the Leiger-Book of the Dean and Chapter of *Lincoln*; but it was disallowed by the Court; for the Book itself is but a Copy, and a Copy of a Copy is no Evidence. And in this Case the Court did presume the Grant to King *James* to be lost; and thereupon Judgment was for the Plaintiff.

If Copies of Court Rolls be shewn to prove a customary Estate, the Enjoyment of such Estate must be proved. *Gilb. L. of Evid. 235.*

What Possession or Entry will prevent the Statute of Limitations.

Recital of a Lease in a Release where it is Evidence.

In Ejectment on a Trial at Bar, the Statute of Limitations was insisted on, and these Points were ruled *per Cur.* 1. That the Possession of one Joint-tenant is the Possession of the other, so far as to prevent the Statute of Limitations. 2. That a Claim or Entry to prevent the Statute of Limitations must be upon the Land, unless there be some special Reason to the contrary. 3. If one makes an Answer in Chancery, which is prejudicial to his Estate, it may be given in Evidence against him, but not against his Alienee. 4. That a Recital of a Lease in a Deed of Release, is good Evidence of such Lease against the Releasor, and those that claim under him; but against others, it is not without proving there was such a Deed, and it was lost and destroyed. 5. If one Joint-Tenant levies a Fine, it severs the Jointure, but does not amount to an Ouster of his Companion. *Ford versus Grey, Salkeld 285.*

In an Ejectment at a Trial at Bar it was held, that the Answer of a Guardian of an Infant in *Chancery*, shall not be read against the Infant; for 'tis only to bring the Infant into Court, and to make him a Party. 3 *Mod.* 258. *Egglestone & al' v. Speke.*

In Ejectment, Defendant claimed as a Purchaser under a Devisee of a Will, and to prove such Will, produced a Bill in *Chancery*, brought by the Heir at Law (under whom the Lessor of the Plaintiff claimed) in which the Will was set out, and that was confessed by the Answer; but held no Evidence though it was proved the Devisee had enjoyed the Lands accordingly. 2 *Keb.* 35.

A Parson in Ejectment must prove Admission, Institution and Induction, his Subscribing the Articles, and Declaring a full and free Assent and Consent to the Book of Common Prayer. *Gilb. Law of Evid. 231. sup. 519.*

But after ten or twenty Years Possession the Clergy shall not be put to the Proof of those Subscriptions, for the long Possession is a Presumption, unless the contrary is proved. *Gilb. L. of Evid. 232.*

But if the Parson shews Admission, Institution and Induction, he need not shew any Right in his Patron on the Ejectment. *Ibid.*

Of Evidence in Trespass.

In an Action against an Inn-keeper, he may give in Evidence that he told the Plaintiff that his House was full, and that he could not lodge him, and that, notwithstanding, the Plaintiff, went in and lodged. *Gilb. Law of Evidence, 259.*

Upon Not guilty in Battery, *son Assault demesne* is no Evidence; for thereby the Battery is confessed. 1 *Inst. 283.* Neither is Not guilty good Evidence upon *son Assault demesne*. In Battery.

Upon Not guilty in Trespass, Insufficiency of the Plaintiff's Mounds, or to justify for a Rent-Charge, Common, Licence, *Son Assault demesne*, or the like, is no good Evidence. *Ib.* Trespass. Mistake of the Day in an Appeal, is not material upon Evidence.
But to prove a Trespass before or after the Day laid in the Declaration, is good to maintain the Action. 1 *Inst. 283.*

Upon Not guilty in Trespass in the Plaintiff's Warren, Evidence that he hath no Warren is good. 10 *H. 6. 17. Kitchen 119.* Warren.

In Trespass Evidence of Agistment of Beasts taken into the Land of the Defendant, will maintain the Declaration. *Gilb. Law of Evid.* 239.

Trespass.

Upon Not guilty in Trespass, a Lease for Years, 12 *H.* 6. 8. or that *locus in quo*, &c. is the Freehold of another, 4 *E.* 3. 45. is good Evidence; and so of a Gift of Goods; but upon this he cannot justify his Entry upon the Place by a Stranger's Licence, or Command, *Br. General Issue*, 81. because this is a Justification by Way of Excuse; neither is a Lease at Will good Evidence in this Case.

Not guilty
in Trespass.

So upon Not guilty in Trespass for Goods, 'tis good Evidence that the Goods were a Stranger's. 9 *H.* 6. 11. But that they were a Stranger's, and that he, as a Servant to the Stranger, or by his Commandment, took them from the Plaintiff, is not good, *Bro. General Issue*, 81. because Trespass is confessed. But that the Stranger gave them to the Defendant is good. 9 *H.* 6. 11. In *Trespass* the Buttrals must be proved as they are laid. 2 *Roll.* 677. *pl.* 1, 2.

The Defendant may plead that he came into the Plaintiff's Close to take his own Horse, but cannot give it in Evidence. *Gilb. L. of Evid.* 253.

A Right to a Way may be pleaded, but not given in Evidence. *Ibid.* 254.

At a Trial at *Hertford Summer Assizes* 10 *W.* 3. in Case for stopping the Plaintiff's Lights, the Defendant pleaded Not guilty; and gave in Evidence that the Corporation of *Hertford* were Lords of the Soil, where, &c. and prescribed to set up Stalls there, being near the Market Place; and it was admitted by *Holt Ch.*

J. to

J. to be given in Evidence upon the General Issue, because this is to claim Property in the Soil; but where the Defendant, or he under whom he claims, claim only a particular Benefit; as Common or Easement, as a Way, and not the Property in the Soil; he ought to plead it specially, and not give it in Evidence upon the General Issue, 10 W. 3. *Kent v. Wright*, Ld. Raym. 732. See *postea*.

If the Trespafs were in Truth done the 4th of May, and the Plaintiff alledgeth the same to be done the 5th of May, or the 1st of May, when no Trespafs was done; yet if upon Evidence it falleth out, that the Trespafs was done before the Action brought, it sufficeth. 1 *Inst.* 283.

And so in Indictments. 3 *Inst.* 230.

If there be two Batteries between Plaintiff and Defendant at divers Times, the Plaintiff is bound to prove the Battery made the same Day in the Declaration, and shall not be admitted to give another Day in Evidence, as the Case may be: As in Battery the Defendant pleaded *son Assault demesne*; and the Plaintiff replied *de injuria sua propria absque tali causa*; and in Evidence the Defendant maintained, that the Plaintiff beat him the Day mentioned in the Declaration, and in the same Place; which the Plaintiff perceiving, he gave in Evidence that the Battery was made another Day and Place; to which the Defendant demurred, upon the Difference aforesaid.

the same Day in his Count, the Defendant did the other Trespafs, &c. to which the Defendant may plead another Justification, but the Plaintiff cannot then plead a Trespafs at another Time, but must conclude, *Sans tiel causa, &c. vide apres*.

Brownlow,

Brownlow, 1 Part, 233. 19 H. 6. 47. But upon Not guilty it is otherwise, though there be never so many Batteries between the Parties. *Littleton*, Sect. 485.

In an Action of Assault and Battery, the Defendant pleads *son Assault demefne*; the Plaintiff replies *de Injuria sua propria*; if on this Issue the Defendant can prove any Assault committed by the Plaintiff on him, tho' it be at a different Day from what laid in the Declaration, the Verdict ought to be for Defendant, for the Day is not material; and on such a Justification the Defendant has the Liberty to prove his Plea at any Time; and the Plaintiff might have made a new Assignment, and then he would have the Election to prove an Assault made on him at any Time; for peradventure there may have been several Trespaffes at several Times, to which the Defendant may have distinct Answers; and if such Pleading and Evidence were not allowed, the Defendant could not know for which Trespafs the Action was brought, nor how to defend himself. 2 Roll. Abr. 680. C. pl. 3. and 2 Roll. Abr. 687. K. pl. 3. 1 Brownl. 233. and the like held in *Comberb.* 50.

Count of Trespafs done in one Acre, Evidence of Trespafs done but in Half that Acre, good. 2 Cro. *Winkworth's Case*. *Gilb. Law of Evid.* 236.

The Lady *Hatton* brought Trespafs for breaking her Close, and taking away her Horse, &c. against the Defendants; they plead Not guilty, as to the taking of (Her) Horse; as to the rest they say, that the Horse of one of the Defendants was in the Close, &c. and they took him out, doing as little Damage as they could,

could, *quæ est eadem*, &c. The Plaintiff replies, *de injuria sua propria*, &c.

The Evidence was, That the Plaintiff, as Lady of the Manor, took the Horse as an Estray, and it was cryed and marked, &c. that the Defendants refused to pay for the Meat, and took him away, before the Year and a Day was out.

1. *Per Wadb. Wyndham* Justice of Assize: A Lord may detain an Estray for Meat, yet no Trespass lies if the Owner takes him, but an Action of the Case lies for the Meat.

2. If the Action had been brought against the Servant only, he must justify, &c. But being brought against Master and Servant, this joint Justification is good.

Cambr. Summer Assizes 1667. Lady Hatton versus Cotes & al.

In Trespass, the Evidence for the Defendant was, That the Defendant had a Barn, and purchased a Way over the Plaintiff's Land to that Barn; after the Defendant bought other Lands lying contiguous to that Barn on the one Side, and to a Haven on the other Side, and carried Carriages by that Way to the Barn, and through it over his own new purchased Land to the Haven. *Per Hale* Chief Baron, If I purchase a general Way to such a Place, I may go from thence on my own Ground whither I please, though I purchase the Ground after the Way purchased. *Summer Assize Norf. 1665, Heynsworth versus Bird.*

Trespass was brought against many, by a School-Mistress, for taking away a Child (her Scholar) with a Scarf of the Mistress's. *Per Kelynge* Chief Justice: In Trespass for taking (Things) all are Principals that are present and

and consenting; *contr.* in taking (Persons); and this Action lies not by the Mistress for the Child, but for the Scarf only. *Lent Norf. Ass.* 1663. *Mary Cooper's Case.*

Trespass lies for Lessee in Ejectment on a fictitious Lease, to recover mean Profits during the Continuance of that Lease mentioned on Record: And the Recovery shall maintain it. Otherwise, if brought by the Lessor, for he is no Party to the Action.

But see *Siderfin* 239. If a Recovery be in Ejectment, and afterwards Trespass is brought for the mean Profits before the Lease, nothing shall be given in Evidence but the Value of the Profits, and not the Title; for otherwise Trials would be infinite.

Also if it be between the same Parties, the Record is an Estoppel; and so the Court held it should be if it was against Under-Tenants.

But *Quere*, If the Defendant be one that has a Title, if he cannot give this in Evidence; for otherwise it would be a great Mischief.

Trespass lies not for pulling down a Pew in a Church, fastned to a Pillar with a Chain. *Contra*, had it been fixed by Nails driven into the Pillar. *Per Glyn* Chief Justice. *Trevor's Case*, *Gilb. L. of Evid.* 238.

Trespass *quare fregit liberam Warrenam suam*, and took his Conies. In Evidence it appeared that the Plaintiff had Liberty of Chase in the Place; which, though it includes Warren, yet a general Trespass lies not, but an Action of the Case. *Earl of Arundel's Case*, *Pasch.* 1658. *B. R.*

Per

Per Earl Serjeant, If Beasts be impounded, and the Key lost, the Officer by Replevin may break the Pound, and deliver the Cattle, *per Stat. Marleberge, 52 H. 3. 21.*

Tenants in Common must join in Trespafs done against them, so Avowry. *Lead and Lamstead's Case, 7 Car. B. R.* cited by *Finch* in Argument; or Tenant in Common surviving shall have Trespafs.

If one Tenant in Common bring Trespafs without the other, the Defendant must plead this in Abatement, and cannot take Advantage of it on the General Issue; otherwise in Ejectment. *Gilb. L. of Evid. 237.*

But if one brings the Action against the other, he may take Advantage of this on the General Issue. *Ibid. 238.*

In Trespafs the Defendant sets forth a conditional Feoffment for Payment of Money at such a Day and Place, and that he paid it accordingly; Issue joined on the Payment at the Day and Place; Evidence of Payment before the Day, is not good. *Contra*, had the special Matter been pleaded with Acceptance. *Moor 47.*

In Trespafs with *Continuando*, to recover ^{1 Leon. 302.} mean Profits, an Entry and Possession of the Land before the Trespafs must be proved, and also another Entry after the Trespafs.

In Trespafs, the Defendant prescribes to dig in the Common for Clay, to repair ancient Houses holden of that Manor, and good. *Berney versus Stafford, Norfolk Lent Assizes 1667.*

In Trespafs they were at Issue on Not Guilty, at the Assizes Defendant left his former Plea, and pleaded an Accord with Satisfaction;

faction; the Judge would have had it replied to, and tried presently, but the Council refused; whereupon the Jury was sworn, and the Plaintiff nonsuited. *Bedford Lent Assizes 1667. Green versus Reynolds.* But this was contrary to the Opinion of Sir Orlando Bridgman at the same Assizes, and contrary to 10 H. 7. 21. and 1 Bul. 92.

Trespass lies by Recoverer in an erroneous Judgment in Ejectment for a mean Trespass, because the Plaintiff in a Writ of Error recovers all mean Profits, and the Law by Fiction of Relation will not make a Wrong-doer dispensable. 13 Rep. Co. 22. but *contra*, where Act of Parliament restores, &c.

Trespass for Assault and wounding in *Suff.* Defendant as to *Vi & armis non Cul.* as to the other, Justification of *molliter manus*, &c. in *Norf.* and several Trials, *per Hale* Chief Baron, *Suff. Ass. Summer 1668.* The *Vi & armis* cannot be tried 'till the other be tried. *Contra*, If the first Issue of *Non Cul.* was as to the Wounding; and by him Evidence of Li-very of Seisin generally, shall be intended for Life only.

*Sen Assault
demeſne.*

Defendant proved Plaintiff threatned him, by saying, "Were it not Assize time, he would tell him more of his Mind," which he said, bending his Fist, and with his Hand on his Sword. *Per Cur.* This is no Assault, as it would be without that Declaration: But it was farther sworn, the Plaintiff with his Elbow punched the Defendant; which, if done in earnest Discourse, and not with Intent of Violence, is no Assault; nor then is it a Justification of Battery after a Retreat. *Keb. 2 Part 545.*

The Hogs of *B.* were put into the Yard of *A.* and broke into the Land of *C.* and did Trespafs: Action lies against *A.* though the Servant of *B.* did look to them and serve them, by which the Owner had the special Possession of them. So if agifted Cattle do trespafs, the Agiftor shall answer. *Dawtry ver- sus Higgins, Clayton 33. per Barkley, 11 Car. York.*

A. by Indenture of Uses raised an Estate to *B.* in Fee, who regrants Turbary to *A.* by another Deed, and after *A.* levies a Fine to confirm the Estate and Uses abovesaid declared; this doth not touch the Turbary. *Per Vernon 11 Car. York, Clayton 42.*

Any one employed by an Officer, is an Officer within 7 *Jac. 5.* to plead General Issue, and give the special Matter in Evidence. *Clayton 54.*

Prescription to tether *Equos & Boves* upon such a Balk, *Mares* and *Cows* good Evidence within that Prescription. *Per Berkley, Clayton 54.*

In Trespafs Defendant justified, by Reason that he, and all those whose Estate he had in such an House from Time out of Memory had Common for so many Beasts; and Issue being joined on the Prescription, it appeared, that this Common belonged to the House, by Reason of Vicinage; and held that the Defendant had not proved his Issue; because that Common, by Reason of Vicinage, does not only begin by the bare Prescription, but there is also with the Prescription this Consideration, that the other Party shall have Common in like Manner in his Land. *13 H. 7. 13. b.*

Trespass de Clauso facto. The Defendant prescribes to have Common, and Issue was joined thereon; the Jury found that the Defendant had Common by Prescription, *prout*, paying for it every Year one Penny to the Plaintiff; held that the Defendant failed in his Prescription; for a Prescription is intire, and Payment of the Penny is Parcel of it. *Croke Eliz.* 546, 563. *Noy* 59.

Trespass for taking away Timber; Defendant pleads a Custom in the Manor, to have the same as Estovers to be burnt *in Terris & Tenementis*; and Issue being taken on the Custom, Defendant only proved the Custom as to the Messuage; and held this did not maintain his Issue. *Godb.* 234. Bishop of *Chichester* versus *Strodwich*.

Per Hale, A Corporation may bargain and sell, though it has been thought an Use upon Use, they being seised to the Use of their House: But I think it rather a Trust than an Use.

If a Justice of Peace send his Warrant to *J. S.* (who is no Officer) to bring one before him, if *J. S.* be no Officer, he is not bound to execute it, yet if he does execute it, it is good, and he may execute it in any Part of the County. And so a Constable of one Town may execute a Warrant in any other Town in the same County, and any such Warrant is as large as the Justice's Commission is. *Per Hale*, *Norf. Summer Assizes* 1668. *Wrongrie's Case*.

In Trespass against one for gleaning on his Ground; *per Hale*, *Norf. Summer Assizes* 1668. The Law gives Licence to the Poor to glean, &c. by the general Custom of *England*, but the

the Licence must be pleaded specially, and cannot be given in Evidence on *non Cul. Gilb. L. of Evid. 253.*

In Trespafs *quare Clausum & Domum fregit & alia enormia ei intulit*; after Verdict for the Plaintiff, and 60 *l.* Damages, 'twas moved for a new Trial by reason of excessive Damages; and upon Affidavit that the Jury intended great Part of the Damages for the Injury the Defendant did to the Plaintiff's Daughter, under Colour of marrying her, &c. which came in under the *& alia enormia*, the Plaintiff had Judgment; and a Difference was taken, that Damages *ex turpi causa* may be given in Evidence under this general Clause, *& alia enormia*, but from nothing else. *Siderfin 225. Sippora versus Bassett.*

Joint-tenancy in Trespafs cannot be given in Evidence; but must be pleaded in Abatement. *Jones versus Randall, Hill. 1652. C. B.*

In Trespafs for taking Goods after Judgment 2 Cro. 551. by Confession, *Non sum informatus*, or *Nil dicit*, Property need not be proved to a Writ of Inquiry; for it would oppose the first Judgment, *quod querens recuperet*, and the Judges might 2 Cro. 220. have assessed Damages if they would, *Yelv. 151.* yet *quare*, if the Defendant may not disprove Property in Mitigation of Damages; for the Jury may find no Damages.

In Trespafs *quare clausum fregit*, with Abut- What ought
tals, all the Abuttals and Descriptions must be to be proved
proved. But if the Abuttal be laid North, &c. in Evidence.
and it incline North, though not directly, it is Abuttals.
sufficient, *& sic de cæteris.* 2 Roll. 678.
pl. 2.

If the Defendant plead *son Assault demesne* Son Assault
in Battery, and the Plaintiff reply *de injuria demesne* in
sua propria absque tali causa, and so Issue is Battery.

joined; if there was a Battery at another Day than what the Plaintiff and Defendant have assigned, by the Plaintiff, upon the Defendant, the Verdict ought to be for the Defendant; for if the Defendant prove an Assault made upon him by the Plaintiff, this ought to be found for him, although it was at another Day than what he hath alledged, for the Day is not material: For upon such special Justification the Defendant hath Liberty to prove his Plea at any Time, and the Plaintiff might have made a new Assignment at another Time; for peradventure there might be several Trespaffes at several Times, to which the Defendant may have several Pleas; and therefore if such Manner of Pleading should not be allowed, and such Evidence, the Defendant could not tell how to help himself, nor could know for what Trespafs the Action is brought. *Vide devant hic & apres. Rolle, Trial, 680. pl. 3.*

Servant.

If my Servant without my Consent put my Cattle in the Land of another, I may plead Not guilty, and give this Matter in Evidence; for by putting the Cattle in, the Servant has gained a Property. *Ibid. 682. pl. 4.*

Parcel.

In Trespafs for taking a Stack of Corn, the Evidence may be of Parr, and the Verdict as to four Combs or Bushels, Guilty; and as to the rest, Not guilty. *Ibid. 684. pl. 6.*

Mic. 22 Car. 1.
Continuando.

For making a Trespafs *Continuando*, there ought to be a Re-entry of the Plaintiff, and for the not proving thereof, the Plaintiff shall have Damages only for the first Entry. *Infra 547.*

Trespafs.

In Trespafs *quare Clausum fregit*, the Defendant says, that *locus in quo*, &c. is six Acres in D. which is his Freehold: The Plaintiff replies, that it is his Freehold, and not the De-

Defendant's; the Defendant cannot give in Evidence other six Acres in *D.* which are his Freehold, because the Plea shall be intended to refer to the six Acres of the Plaintiff's. *Dyer* 23.

The Defendant cannot give a Licence, or defect of Inclosures, in Evidence. *Gilb. Law of Evid.* 252, 3.

Upon the General Issue, any Thing may be given in Evidence, which proves the Plaintiff had no Cause of Action.

Trespafs by the Warden of the Fleet; upon Trespafs. Not guilty, you may give in Evidence, that he is not Warden. 4 *E.* 4. 7.

So in Trespafs of a House, that he had no House there, or the Freehold of another, and not of the Plaintiff, is good Evidence upon Not guilty; But in Trespafs of Goods, 'tis no good Plea to say, the Property was in another, although it is in a Replevin; and therefore it seems to be no good Evidence in Trespafs, because Possession maintains the Action against all but the Owner; but that the Property was in a Stranger, and he gave them to the Defendant, is good. But in Trover, that they were not the Goods of the Plaintiff, is good Evidence. 5 *H.* 7. 3.

Cessavit, and Count of divers Lands held *Cessavit*. by intire Service, upon *Non tenuit modo & forma*, held by several Services is not good Evidence, for he had no such Cause of Action. 10 *H.* 7. 24.

Upon the General Issue, for the Defendant by Regula. Evidence to convey to himself the same Interest and Title, is good Evidence.

Trespafs.

As in Trespafs of Goshawks, Not guilty, and Evidence, that he had a Lease of that Wood for Years where they were taken, is good, for it is his Title.

Account.

Account of Receipt by the Hands of J. S. the Defendant pleads *Ne unques son Receiver*, and Evidence that J. S. gave this to him, is good, 2 H. 4. 13. So in Trespafs, a Lease for Years, Tenancy at Sufferance, (but not at Will) that they were a Stranger's Goods, who gave them to the Defendant, is good Evidence upon Not guilty. 22 Aff. 73. because by these Matters he makes himself a Title; *et sic de cæteris*.

Regula.

Upon the General Issue, if by the Evidence the Defendant acknowledge that he did the Wrong, and justify this, and gives Matter that goes to discharge him of the Act by Justification, this Evidence is not good, but he ought to have pleaded it.

This Rule is demonstrated by those Cases, where, upon Not guilty in Trespafs, the Defendant would say the Property was in a Stranger, and that by his Commandment, or as his Servant, he took the Goods. Not guilty, and that he did the Battery *se defendendo*. Not guilty in Maintenance, and lawful Maintenance. Insufficiency of Mounds. The Freehold of a Stranger, and his Licence, A former Recovery in another Action. So for Common, Rent-service, Rent-charge, Licence, &c. cannot be given in Evidence upon the General Issue; for these Matters in Evidence are Justifications, which go in Discharge of the Party, not by Title, but by Justification,

So

So where an Imprisonment or Entry is given by Authority of Law, or by Authority from any Party, as for an Imprisonment by the Statute, against Trespassers in Parks, putting a Man off his Ground, thrusting a Man out of Church that troubles the Congregation in Service, parting an Affray, and keeping the Quarrellers apart, in Defence, of himself or his. Entry in Perambulation. Entry to amend his Gutter leading to his House, as of ancient Time had been used. That it was a common Inn. That he put in his Cattle by the Plaintiff's Agreement. That he entred and took the Emblements after the Death of the Tenant for Life. That the Plaintiff owed him Money, and by his Invitation he went into his House to receive it. That he took the Goods as a Heriot, Waif, Estray, or Wreck. Or the Plaintiff took away the Defendant's Cattle, and he entred into the Close where they were, and took them again. That he took the Cattle Damage-feasant in his Ground, or for an Amercement in a Leet, &c. That the Goods were the Goods of J. S. who delivered them to the Plaintiff to keep, and J. S. commanded the Defendant to take them; or excuse it, that the Plaintiff delivered them to him. That he took them by a Writ. That as Schoolmaster he gave moderate Correction. *These are Excuses and Justifications without Title, and therefore must be pleaded, and cannot be given in Evidence upon Not guilty.*

So in an Action *de malefactoribus in parcis*, he cannot plead Not guilty, and give a Licence in Evidence. So in an Appeal, if he plead Not guilty, and shews that he was Sheriff, and executed his Office, or that he was Forester,

and killed him because he fled, and would not submit. *Wile* 12 H. 8. f. 1. the best Case of this Matter.

Trespasß *quare Domum & Clausum fregit & bona apportavit*. The Defendant did the Trespasß by Virtue of a Commission of Bankruptcy; held that the Defendant must justify, and cannot plead Not guilty, and give the special Matter in Evidence; but if the Trespasß had been only for taking the Goods, he might. *Littleton Rep.* 356.

Trespasß for entering his Close and taking away Corn. Defendant pleads that he was Servant to the Parson, and that the Corn was Tithes severed. Plaintiff demurred specially, as amounting to the general Issue; but the Plea was held good; for as to the breaking the Close, such Matter cannot be given in Evidence; but if the Trespasß had been only for taking the Corn, it had been only the General Issue, and the Demurrer had been good. 2 *Keb.* 44.

Trespasß.

In Trespasß for Goods taken, the Defendant, upon Not guilty, in Mitigation of Damages, may give in Evidence, That the Plaintiff had is Goods again. 11 *H.* 4. 24. 19 *H.* 6. 34.

Falſe Impriſonment.

Upon Not guilty, the Defendant gave in Evidence, That by the Plaintiff's Agreement he carried him from D. to S. and held good, because, what is done by the Plaintiff's Agreement, is no Imprisonment. 14 *H.* 6. 2.

In an Action for false Imprisonment, the Defendant may give in Evidence, that he took the Plaintiff by Virtue of a Warrant from a Justice of Peace, by the 7 *J.* 1. *Gilb. Law of Evid.*
See *poſtea. p.*

Tenant

Tenant for Life leaseth for Years, who is ^{Emblements.} ousted, and the Tenant for Life is disseised: ^{Knivet's} The Disseisor leaseth for Years, his Lessee sows ^{Cafe, Lib.} the Land; the Tenant for Life dies; he in Remainder in Fee brings Trespass against the Defendants claiming the Corn sown by the Lessee of the Disseisor. Adjudged, That the Defendants had not the meer Right; but in respect of their Possession, they should bar the Plaintiff, who had no Right; and that the meer Right was in the Lessee of the Tenant for Life, and that he might bring Trespass against the Lessee of the Disseisor, and recover all the mean Profits. But as to the Entry into the Land to take the Emblements, this was good Matter of Justification; but in regard it was not pleaded, it could not be given in Evidence upon Not guilty; and therefore the Plaintiff had Judgment for the Entry, and was barred for the Residue. *Note*, That the Lessee of Tenant for Life had Right to the Land, and by Consequence to the Emblements, as Things annexed to the Land, and the Death of the Tenant for Life determines his Interest to the Land, but his Right to the Emblements remains.

Trespass concerning the Rectory of *Norton-Pinckney*, which belongs to *Oriel College in Oxford*. The Issue was, if there was a Vicarage endowed there, or only a stipendiary Curate. ^{Note Leon. 3 Part 210.} If the Parties admit a Thing ^{per nient dedire,} the Jury is not bound by it; but where upon the pleading a special Matter is confessed, the Jury shall be bound by it.

1. All agreed, That if a Vicarage be erected and established, if there was no Endowment *de facto* of the Vicarage, the Vicar could not claim any Thing.

2. There

Impropria-
tion.

2. There was shewed an Impropriation, by the Licence of the Pope, made in the Time of E. 2. *Dodderidge* said, That was not good. *Jones è contra*. And it will be perilous to such ancient Impropriations, if now the Consent of the King must be shewed; and at that Time it was held good by the Assent of the Pope without the King. *Dodderidge* denied that the Pope without the King at that Time could make an Impropriation with the Ordinary and Patron. But *Crew* agreed with *Jones*. And in Things of such Antiquity *omnia præsumuntur solempniter esse acta*, and said, that so it was ruled in a Case before: And *Jones* said, it was nothing to the Vicar, for the Vicarage may be endowed without the Consent of the King, and it is not *Mortmain*. *Palmer's Reports* 427. *Erasmus Cope's Case* against *Bedford*.

Trespass; the Defendant pleads, that the Place where was his Freehold; and upon that Issue was joined. The Jury found that the Defendant married a Woman who was seised in Fee of the Place where, and that thereby Baron and Feme in the Right of the Wife were seised. Held by three Judges that Defendant had not proved his Plea. 2 *Ander-son* 48.

*Hors de son
Fee.*

Where *hors de son Fee* is pleaded, a Release of the Seigniorship is good Evidence. 8 E. 2. 262.

Trespass.
Freehold.

In Trespass against two for entering into the Plaintiff's Land, if one pleads his Freehold, and the other, that he entered by the Commandment of him that pleads it is his Freehold, here is to be but one Issue joined, viz. by him that claims the Interest, for upon that Issue all depends:

depends: If it be found against him, his Servant has no Colour.

Defendant may give in Evidence, that the Right of the Freehold was in *A.* and that he entred by his Command. *Gilb. L. of Evid.* 258.

In Assault and Battery, if the Plaintiff prove only the Assault, he shall recover, for an Action Battery. Of Trespafs lies for an Assault. Of an Assault and Battery, Assault and Menace, &c. See *Roll. Assault.* Tit. *Trespafs*, 545. *F. N. B.* 91. a. &c.

To lay Hands gently upon the Shoulders of a Man, and say, that is he against whom the Justice's Warrant is: Or to serve him with a *Subpœna*, proves no Battery.

These Things following are good Justifications, but cannot be given in Evidence upon the General Issue.

Correction by the Parties, Master, or Schoolmistress; Apprehension of a common Cheater at Dice, *Molliter manus imposuit*, upon one setting a Dog upon him. Beating one by the Husband in Defence of his Wife, by the Master in Defence of his Servant; or by the Servant in Defence of his Master. Holding a Man that cometh to stop the River to his Mill, or to throw down his Booth. Inevitably discharging his Musket in the Plaintiff's Face at a Muster. Beating one in Defence of his Possession of his Goods, House, Lands, Goods distressed, &c. by a Forester, of one who resisted in the Forest. That he imprisoned another to prevent Mischief. As the holding of another with whom he was fighting, (not wrangling with Words) until the Fury be over.

Lunacy will not excuse in Battery, although it will of Felony.

Note; a Man may justify an Assault and Battery, but not wounding or maiming of Life or Member, or Mayhem, in Defence of the Possession of his Lands or Goods.

2 Inst. 316.

An

Tenant in
Common can-
not justify to
enter into his
Companion's
Ground to
take the
Horse they
have in Com-
mon, altho'
he may take
him else-
where.

An erroneous Proceſs to an Officer out of a Court having Jurisdiction, in Aid of the Bailiffs. That the Executor entred the Plaintiff's Ground to take the Teſtator's Timber there. That he had a Fiſcary, and put Stakes in the Soil. Taking his Goods ſtolen, in the Plaintiff's Houſe, upon freſh Purſuit. Entering his Soil to throw down a Nuiſance. Or to take my Cattle, which the Plaintiff put in his Ground. To throw down the Plaintiff's Houſe on Fire, next mine. Breaking his Windows or Houſe to get out, where he imprifoned me. To take a Handful of Grain out of his Heap, who took one out of mine, and threw it into his. To carry away his Grain or Money which he threw into my Heap. To chaſe his Cattle with a Dog out of my Ground, Damage-feaſant. To throw that into the Plaintiff's Ground which he threw into mine. That my Cattle took a Mouthful, &c. of his Graſs paſſing in the Way I had over his Ground, againſt my Will. Throwing Goods into the Thames out of a Barge, to ſave the Lives of the Paſſengers. To fetch out of the Plaintiff's Ground the Trees he granted me. To dig his Ground to mend my Pipe there. That I hunted Cattle out of my Ground with a Dog, which againſt my Will run into his Ground, I raring and recalling him. A Preſcription to cut Graſs in the Plaintiff's Ground lying nigh the Church, to eſtrow the Church, being but an Eafe-ment.

Defendant may juſtify, by reaſon of a Preſcription, but cannot give it in Evidence. *Gilb. Law of Evid.* 257.

Diſtreſs

Distress by a Stranger as Bailiff, and the Assent of the Party. By the Command of the Chief Justice, Order of Chancery, &c. *Roll. Tit. Trespafs*, 559. That the Plaintiff ought to impale against a Forest; and for Default of Pales, the Beasts went in, and the Forester fetched them out.

These are Justifications and Excuses that must be pleaded, and cannot be given in Evidence upon Not guilty, unless it be in Mitigation of Damages.

Trespafs lies for Goods stolen; although the Trespafs Thief be convicted of Felony. *Latch* 144. *Markham's Case*. And so I knew my Lord *Hale* held, although in *Roll. Tit. Trespafs*, 557, it is said, if it appears on the Evidence that it was Felony, Trespafs lies not. Which I think is Felony: not Law.

A Man who sows the Lands to Halves with the Owner, or three agree to sow the Land, where two of them have no Interest, if a Stranger take the Corn, they cannot join in Trespafs, having no Interest but an Agreement; but the Owner only must bring the Trespafs. *Cro. 3 Part* 143. *Goldsb.* 77.

Upon reversing an Outlawry, the Party is restored, and may have Trespafs; but upon Reversal of a Judgment the Party shall only be restored to the Money for which the Sheriff sold his Term, upon a *Fieri fac'*. *Cro. 3 Part* 270.

Upon Not guilty in Trespafs *quare Clausum fregit*, at the Trial the Defendant shall not say, that the Plaintiff is Tenant in Common, he
Tenancy in Common. Where Tenants in Common shall join
 in an Action, and where not, and what Actions the one shall have against the other. See 1 Inst. 197, 200, &c. *Godb.* 172.
should

should have pleaded this, and hath now lost his Advantage; and if the Jury find it, their finding is not material. *Cro.* 3 Part 554.

Trespafs by *Ross* for breaking his Close, and beating his Servants; on Not guilty the Jury found, That Sir *T. Bromley* was seised in Fee of the Place where, and leased the same to the Plaintiff and one *A.* which *A.* assigned his Moiety to *C.* by whose Command the Defendant entred. Held by the Court, that this Tenancy in Common betwixt the Plaintiff and *A.* under whom the Defendant justified, might be given in Evidence on this Issue. 3 *Leon.* 83.

In Trespafs *quare clausum fregit*, it is a Plea in Abatement to say, that the Plaintiff is Tenant in Common with another, but cannot be given in Evidence on Not guilty, as it may where one Tenant in Common brings Trespafs against the other. 1 *Vent.* 214.

Trespafs against *A.* and *B.* for taking Water out of Plaintiff's Well: *A.* pleads in Abatement, that *B.* and the Plaintiff were Tenants in Common of the Well; and Plaintiff replied he was sole seised. And *Holt* Ch. J. held it was no Plea in Abatement, for a Defendant to say he was Tenant in Common with the Plaintiff, because he may give it in Evidence on Not guilty; but that this Defendant, who was a Stranger, might well plead the Tenancy in Common of the Plaintiff and other Defendant. 1 *Salk.* 4. *Farrell.* 104.

Woods.

A Man sells all his Woods standing, growing, &c. upon the Premises, to hold during the Life of the Vendor, rendring Rent; the Vendee cuts down all the Trees: If he cuts
Wood

Wood afterwards growing in the same Place, the Vendor may have Trespafs. *Leon. 3 Part 7.*

Trespafs lies for a Copyholder against the Copyholder. Lord for cutting down Trees, that he the Tenant ought to have for Repairs. *Godbolt 173.*

If the Recoveror brings Trespafs, though the Judgment be reversed by Writ of Error, he may give this Matter in Evidence, and maintain his Declaration. *Gilb. Law of Evid. 239.*

By Seizure of an Estray, the Lord hath but Estray. the Custody and not the Property; and therefore if he works the Horse, Trespafs lies. *Yelverton 96, 97.*

Trespafs with a *Continuando* cannot be for *Continuando*. taking a Horse, nor ten Trees, &c. nor without a Re-entry by the Disseised, unless his Re-^{Roll. Trial,} entry be taken away by the Act of God, or the ^{549. & I.} estate be determined so as he cannot enter; as ^{550. sup. 556.} if Tenant *pur auter vie* be disseised, and *Cestui que vie* die, for there his Entry is taken away by the Act of God; otherwise if it be taken by his own Act, as if he release to the Disseisor, &c. *19 H. 6. 28.*

Upon *Non cul.* no Park by Prescription or *Parco frañs.* Grant is good Evidence. *18 H. 6. 22.*

General Trespafs for breaking his Park, and ^{Park.} taking his Deer, &c. doth not lie at Common Law, but a Writ is given by the Statute *West. 1. cap. 20.* So if *A.* have a free Warren in Warren. the Soil of *B.* *A.* shall not have Trespafs, but Case, for entering the Warren and stopping the Holes, &c. *Roll. Trial, 550. L.*

A Commoner cannot have Trespafs for the Commoner. Grass. After a *Supersedeas* shewed to the Bai- ^{Falfe Impri-} liffs, false Imprisonment lies against them, not ^{sonment.} against

Roll. Trial,
552.

Possession.

Relation.

Trespass.

against the Sheriff; so against the Bailiff of a Franchise, if he takes other Men's Goods in Execution upon the Sheriff's Warrant; not against the Sheriff, nor against the Party, unless he procure the Plaintiff to take the Wrong. See *ante p.*

He that hath the Freehold in Law, unless he hath actual Possession, cannot have Trespass; therefore the Heir cannot have Trespass against the Abator, nor against the Tenant at Sufferance before he hath entred, and only from that Time: But an Executor or Administrator shall, by Relation, have Trespass from the Death of the Intestate, &c. But a Disseisee after Entry, shall have an Action for all mean Trespasses from the Disseisin, even against Strangers, for he is restored to the Possession *ab initio*. Roll. Trial, 553. S. 554. T.

Trespass cannot be maintained against him who comes by the Goods lawfully, as by the Plaintiff's Delivery, or under that, or by Act in Law, &c. *but Detinue*. But Trespass lies against Tenant at Will, or him that I lend my Goods to, who destroys them; for thereby the Privy is determined. It lies against a Miller for taking Toll where none is due; for taking my Servant out of my Service; for rescuing one taken at my Suit out of the Bailiff's Hands, for the Bailiff is my Servant. For beating my Wife or Servant, *per quod*, &c. Not against him that J. S. sells my Horse to, or has my Goods from the Sheriff, although the Sheriff took them wrongfully. Roll. Trial, 555, 556. It lies for hunting a Fox, &c. in my Ground. Against Churchwardens, who act by the Justices of the Peace's Warrant, if the Warrant be not good.

For

For digging so near my Ground that it fell into the Defendant's Pit : But not that my House fell into the Pit, for it was my Fault to build so near another Man's Ground : For entering my Ground, to take out his Falcon, which flew thither after Game. For killing my Tumbler in his Warren.

The Defendant may prevail on Not guilty in Trespafs, by making Title to the Land. *Gilb. Law of Evid.* 242.

Qu. By making Title to the Profits. *Ibid.* 242, 3.

Although I sell the Goods, it lies for a Trespafs done before. Tender of sufficient Amends before the Action brought, is a good Bar for a *negligent* Trespafs, not for a *voluntary* one.

If a Man enter into a Place by Authority *Ab initio*. of Law, and abuse this Authority, he is a Roll. Trial, Trespasser *ab initio*, for his first Entry shall be ^{561.} G. intended for this Purpose. As if the Lessor enter to view Waste, and stay all Night. If the King's Purveyor sells my Goods. If the Searcher abuses my Stuff. If a Man will stay in a Tavern all Night. If he detains a Distress after Amends tendred before impounding. If a Bailiff refuse Bail, Trespafs doth not lie against him *ab initio*, but Case ; for the Sheriff or Under-Sheriff, not he, ought to take Bail ; not against the Party nor Bailiff, or Person in Aid, if the Sheriff doth not return his Writ of *Latitat*, or makes a false Return ; but it doth against the Sheriff : So of an Officer of an inferior Court.

If the Lord work an Estray, Distress, &c. or Executors find a Bond and cancel it, thinking it was discharged, and it was not ; they are

Trespassers *ab initio*, although they came lawfully to the Possession at first. *Roll. Tit. Trespas*, 563.

Lunatick.

The Lunatick (and not the Person to whom he is committed) must bring the Action in his Name for a Trespass done in the Land. *Brownl. 1 Part 196.*

In Trespass on Not guilty the Defendant cannot give Evidence that the Place was a Highway.

In Trespass *quare Clausum fregit*, Not guilty was pleaded; and on Trial the Defendant gave Evidence, that it was in a Highway. *Et per Cur'*, It is a special Justification, and ought not to be allowed to be given in Evidence on the General Issue. *Holt said*, in Case for disturbing the Plaintiff of his Common: Upon Not guilty pleaded, he had known the Defendant permitted to give in Evidence, That he had a Right to Common there, but he never thought it right, and had never allowed it. *Watson versus Sparks, Salk. 287. antea.*

In Trespass for digging a Hole in the Way, whereby his Horse fell in, &c. the Plaintiff must prove the Way, and that the Defendant dug the Hole. *Gilb. L. of Evid. 241.*

If a Man be proved dead, when it is declared he assumed, Proof of a Promise at another Day, is good; but in Trespass, Proof of his Death on the Day discharges the Action. *Gilb. L. of Evid. 241, 242.*

Note; That if upon Evidence it falls out, the Trespass was done before the Action brought, it suffices. *Gilb. L. of Evid. 241.*

Of Evidence in Assault.

In Trespass of Assault, Battery, and Wounding, the Defendant pleaded the Plaintiff began first, and the Stroke he received, whereby he lost his Eye, was on his own Assault, and in Defence of the Defendant; and on Trial at Bar, now by Evidence it appeared, the Plaintiff threatened the Defendant, and said, Were it not Assize Time, he would tell him more of his Mind, which was said, bending his Fist, and with his Hand on his Sword: Yet, *Per Cur.* This is no Assault, as it would be without that Declaration: But it was farther sworn, that the Plaintiff with his Elbow punched the Defendant; which, if done in earnest Discourse, and not with Intention of Violence, is no Assault, nor then is it a Justification of Battery after a Retreat; as *Phineas Andrew's Case*: And the Jury, not believing the Defendant, found for the Plaintiff, and gave 500*l.* Damages. *Vin. Abr. Tit. Evid. 85. pl. 1. cites 2 Keb. 545. pl. 13. M. 21 Car. 2. B. R. Turberville versus Savage.*

In Action of Battery, which was laid in the Declaration to be 18th Day of *February* 1621. Defendant pleaded *Son Assault demefne, &c.* and Issue upon that, and the Defendant proved an Assault by the Plaintiff, but at another Day, and ruled that this does not prove this Issue for the Defendant, because the Justification shall refer to the Time laid in the Declaration, if the Defendant do not difference the Times in his Plea; and in such Case, when the Defendant intends to shew the Assault was at another Day and Place, he shall shew that such a

Day before that in the Declaration, as here, 8th February, the Plaintiff did assault him, and would have beaten him; and traverse the Day in the Declaration. *Vin. Abr. Tit. Evid. 86. pl. 2. cites Clayt. 110. pl. 187. March 24 Car. Turner Serjeant, Judge of Assize, Hardcastle v. Lockwood.*

But see in the Case of an Officer who is not tied up to special Pleading; it seems he, upon Not guilty, may vary in his Evidence, to justify from the Time in the Declaration, &c. *Quod Nota*; and the Prejudice may come to the Plaintiff's being unprovided perhaps in such Case to a Reply; whereas when the Matter pleaded is brought to a special Issue, he knows his Work, &c. 24 Car. Hardcastle ver. Lockwood, *Clayt. 110. Vin. Abr. 86. p. 3.*

Concerning Belief.

It is no Satisfaction for a Witnesses to say, that he thinks or persuades himself, and this for two Reasons, by Coke; 1st, Because the Judge is to give absolute Sentence, and ought to have more Ground than Thinking. 2dly, That Judges, as Judges, are always to give Judgment *secundum allegata et probata*, notwithstanding that private Persons think otherwise. *Vin. Abr. Title Evid. 86. cites Dy. 53. b. Marg. pl. 15. Mich. 19 Jac. in the Star-Chamber. Adams versus Canon.*

Of Evidence in Trover.

In Trover two Things ought to be proved, Trover, the *Property* and the *Conversion*.

Upon Not guilty in Trover and Conversion, a Demand and Denial of the Goods, is good Evidence of the Conversion (a); but when the Goods come to the Defendant by Trover, there must be an actual Demand and Denial. *Plow. 14. lib. 10. 57. Cro. 1 Part, ult. pub. 495. Hob. 187. Moor 460. Abridg. Roll. 5. Gilb. L. of Evid. 260, 261.*

In Trover for Corn to prove a Conversion, it was proved that Plaintiff demanded Satisfaction for the Corn; and held good Evidence, tho' the Corn itself was not demanded. *Clayton 122.*

Upon Not guilty in Trover, the Defendant may give in Evidence, That the Goods were pawned to him for 10*l.* that he distrained them for Rent or Damage-feasant: That as Sheriff, he levied them upon Execution, or that he took them as Tithes severed. *Cro. 1 Part 157. 3 Part 435. Hob. 187.* A Demand and Denial of the Goods is Evidence of a Conversion.

If Trover be for bare Money, a Request and Denial is so strong a Presumption of Conversion, that nothing can be proved to the contrary; but if it be for Money in a Bag it is not conclusive Evidence. *Gilb. L. of Evid. 262.*

(a) If an unjust taking of Goods be proved, this is good Proof of a Conversion, though there be no Proof of a Demand and Refusal. *Gilb. L. of Evid. 266.*

In Trover, Defendant cannot give a Release in Evidence, but he ought to have pleaded it. *E. 10 W. 3. B. R. Kingston v. Read, at Guildhall. Comb. 473.*

In Trover an actual tortious taking of the Goods was proved; and held good Evidence without proving a Demand, for that is an actual Conversion; but *contra* where the Goods are found, there a Demand must be proved.

1 Sid. 264. *Brewen versus Roe*.

Trover of five Kine; on Not guilty a Special Verdict was found, That *B.* was possessed of these five Kine, and put them to pasture with the Defendant, and agreed to pay one Shilling a Week for each, as long as they continued at Pasture; that afterwards *B.* sold them to the Plaintiff, who demanded them of Defendant, who refused to deliver them, unless Plaintiff would pay for the Pasturage, which came to 10*l.* and held this Denial a Conversion; for he cannot detain the Cattle against him that brought them, till the 10*l.* paid, but is drove to his Action against him that put them there; and is not like the Case of an Inn-keeper or Taylor, who may detain till paid. *Cro. Car.* 271.

In Trover it was held, *per Holt*, C. J. at *Nisi prius*, That a Demand and Refusal is an actual Conversion, and not only Evidence of a Conversion; and tho' the Plaintiff on a subsequent Tender refused to take them, yet held, that the Action lay; nay, if on such Tender the Plaintiff had taken the Goods, an Action would have lain on the former Conversion; and his having the Goods again, would only have gone in Mitigation of Damages. *6 Mod.* 212.

The Citizens of *London* gave in Evidence, on Not guilty in Trover, their Custom to take Toll. *W. Jones* 240.

In

In Trover, on Not guilty the Defendant gave in Evidence, That the Goods were taken and sold by Virtue of a Commission of Sewers; and held it might well be given in Evidence. *Alley 92.*

In Trover for an Horse proved of 15*l.* Value, the Jury gave but 3*l.* Damages, upon Mistake, they thinking that the Plaintiff had his Horse again.

Per Wadb. Wyndham, If the Jury had not been gone, they should have mended their Verdict; but a new Action of Trover lies for Damages for the Horse, in which the Jury shall prove the 3*l.* given was only for the Conversion, not the Value of the Horse; and by him, Trover lies for Goods in the Plaintiff's Possession, to recover Damages for the Conversion only. *Tyndal versus Jolliffe, Norf. Lent Assizes 1660.*

The Abuse of an Horse lent is no Evidence in Trover; but if a Man lends his Horse to go to *York*, and he goes to *Carlisle*, this Evidence will maintain Trover. *Gilb. L. of Evid. 265.*

In Trover by Administrator, where the Conversion was in the Time of the Intestate, the Plaintiff must shew the Letters of Administration; *contr.* where the Conversion was after his Death. *Per Hale, Norf. Summer Assizes 1660.*

If an Estray be claimed within the Year and the Day, &c. and the Lord refuses to deliver it; Trover lies, though the Keeping is not paid for, and the Lord says, he detains for the same; for the Lord cannot detain for the Meat, &c. but must bring his Action. *Per Moreton Justice, Lent Assizes Norf. 1667. Bond versus Paston,*

Paston, Quare. Vide Dent. Tit. Trespass; per Wyndham cont. and I think is Law, vide Roll. Tit. Estray, 889.

At the same Assizes *Daniel versus Berney*, by *Moreton* Justice, Proclamation may be made of an Estray by any Person, and it is not necessary that it should be made by the Bell-man or any other Officer. *Vide Co. Entries 170. Barber versus Faucet.* In Trover, Issue was joined on Tender of Amends for Keeping, &c. and Verdict *pro* Plaintiff, and Judgment.

Note; I find Precedents, that in Trover the Matter of an Estray may be pleaded specially, or given in Evidence on Not guilty.

Trover for Goods; the Defendant pleads a Sale in Market Overt; and held ill, because it amounted to the General Issue. *Cro. Jac. 165.*

Where the Defendant has a *general* Property, he may give it in Evidence on the General Issue. *Gilb. L. of Evid. 263.*

Trover for Loads of Corn; the Defendant justifies, and intitles himself to them as Tithes severed; and held ill, because it amounted to the General Issue, that being shewn for Cause of Demurrer. *Cro. Car. 157.*

Trover for an Horse; Defendant pleads that he was a Common Inn-keeper, that he took the Horse at Livery, and he died; and held an ill Plea because it amounted to the General Issue. *1 Roll. Rep. 22.*

Trover by the Executor of *J. S.* the Defendant pleads that *J. S.* died Intestate, that Administration was granted to *A.* who sold the Goods to Defendant; and on Demurrer held ill, as amounting to the General Issue. *1 Keb. 318.*

In Trover for Jewels, it was said by *Twisden* there is no Plea in Trover but a Release, or Not guilty, every special Plea in Justification being but tantamount. 1 *Keb.* 305.

Oats were taken from the Owner, and carried to a Miller to make into Oat-meal; and before it was done, the Owner prohibits the Miller, &c. and demanded the Oats, who notwithstanding made them into Oat-meal. *Per Berkley*, it is a Conversion in the Miller, 1638. *Clayton* 57. *Holfworth's Case*.

On *Non Cul.* the Defendant gave in Evidence a Seizure of Goods foreign bought and foreign sold. *Per Custom of Lynn, Norf.* good, *per Hale, Norf. Sum. Assizes* 1668. *Harwich* versus *Twells*.

In Trover against Husband and Wife, the Proving the Goods in the Possession of the Husband and Wife is sufficient. *Gilb. L. of Evid.* 259, 260.

A Man lends his Horse to a special Purpose, the Bailee abuses the Horse, and over-works him, then the Lender takes the Horse again. *Per Hugh Wyndham Justice, Lent Ass. Bucks*, Trover lies not. *Constable's Case*.

Trover.

Actual prisel est bone Evidence de prover Conversion sans demand. *Sid.* 264.

In Trover for Goods, the Proof depended on a *Fieri facias*, and *Venditioni exponas*, which Record could not be found on Record, and admitted to be proved in Evidence. *Hardres's Rep.* 323, 324.

A Seizure and Condemnation in the Exchequer of forfeited Goods, may be given in Evidence upon Not guilty in Trover, but it must

Trover.

Trespass.

Vide Roll.

1 Part 1, 2.

A Custom pleaded in Trover to take Corn to repair a Bridge, and Cro.

Eliz. 433, and 262. Promise.

be

be pleaded in Trespass. In Trover of a Horse, that he is a common Hostler, and that the Horse was put to him at Livery and died, is good upon Not guilty. *Roll. 1 Part 22.*

Per Dodderidge, In Trover and Conversion of Goods, if the Defendant derive a Title from a Stranger, this amounts to the General Issue; otherwise if from the Plaintiff. *Latch 186.* And Bailment of the Goods to deliver to another, and Delivery accordingly, amounts to the General Issue, and may be given in Evidence upon it. *Bulst. 3 Part 209.*

Trover against
a Carrier.

If a Carrier lose Goods, a special Action of the Case lies against him, but not Trover, *Roll. Abr. 6.* so of a common Carrier by Boat. *Noy 114.*

If Goods be delivered by the Owner to A. to keep, and he converts them to his own Use, this is sufficient Evidence of a Trover. *Gilb. Law of Evid. 260.*

Declaration
of a Trover
in Middlesex,
and Proof of
one in Ireland,
good.

Brown versus Hedges, Trin. 7 A. B. R. In Trover upon Not guilty pleaded, it appeared in Evidence, that the Defendant was Tenant by the Courtesy of Lands in Ireland, and had cut down and sold the Trees off the Estate, and that the Reversion belonged to the Plaintiff, and two others in Coparcenary: Upon a Case made for the Opinion of the Court, it was resolved, That in local Actions, as in Trespass *quare Clausum fregit*, the Plaintiff cannot prove a Trespass but where he lays it, nor lay it in any other Place but where it is; but it is otherwise in Actions transitory, as Trover; *Ergo* here he may lay the Conversion here, and prove it in Ireland, *vide Stile 331.*

One Joint-

tenant cannot bring Trover against his Companion, but may against a Stranger, and it is only pleadable in Abatement.

Parcener

Parcener, cannot bring Trover against another; if he does, it is good Evidence upon Not guilty: But if one Joint-tenant brings Trover against a Stranger, in that Case the Defendant may plead it in Abatement, but cannot take Advantage of it in Evidence.
 2 Lev. 113. Cro. Eliz. 554. Salk. 290.

In Trover upon Evidence at a Trial before Holt Chief Justice, at the Sittings in *Middlesex*, the Case was, The Plaintiff proved the Goods to be in his Possession, and to be taken away by the Defendant. The Defendant shewed that these were the Goods of *Jane Blackburn* in her Life-time, and that the Defendant had taken out Letters of Administration to her, and so was intitled to the Goods: Upon this the Plaintiff proved, that some few Days before her Death she was actually married to him: And in Answer to that it was insisted, That the Spiritual Court had determined the Right to be in the Defendant; for they could not have granted Administration to the Defendant, but upon supposing there was no such Marriage, and that this Sentence being of a Marriage within their Jurisdiction, was conclusive, and could not be gain-say'd in Evidence. *Et per Holt* Chief Justice, A Matter which has been directly determined, by their Sentence, cannot be gain-say'd. Their Sentence is conclusive in such Cases, and no Evidence shall be admitted to prove the contrary, but that is to be intended only in the Point directly tried; otherwise it is if a collateral Matter is collected or inferred from their Sentence; as in this Case, because the Administration is granted to the Defendant, therefore they infer that the Plaintiff was not the

Sentence of the Spiritual Court, in a Cause within their Jurisdiction, is conclusive Evidence in the Point tried; otherwise of a collateral Matter.

the Intestate's Husband, as he could not have been taken to be, if the Point there tried had been *married or notmarried*, and their Sentence had been, *Not married*. *Salk. 290. Blackham's Case.*

Trover for Million Lottery Tickets; in Evidence it appeared that the Plaintiff gave the Tickets in Question to a Goldsmith to receive the Money due on them; and that this Goldsmith had received Tickets of the Defendant, and given a Note to pay him so many Tickets, and that the Plaintiff's Tickets were delivered to the Defendant by the Goldsmith on this Note. Held by *Holt Ch. J.* at *Nisi prius*, that Plaintiff ought to recover, for that the Goldsmith's having Tickets of both Plaintiff and Defendant, and delivering the Plaintiff's to the Defendant was no Change of the Property; for tho' the Goldsmith had Power to receive the Money, he had no Power to change the Tickets. *1 Salk. 283. Ford versus Hopkins.*

If the Nature of the Thing be altered, this is good Evidence of a Conversion, but not of a Writ of *Detinue*. *Gilb. Law of Evid. 264.*

Note; In Trover the Plaintiff must prove Property, but not in Trespass. *Gilb. Law of Evid. 268.*

Of Demurrers upon Evidence.

Middleton against Baker, Cro. Eliz. 42. f. 751. In Ejectment, it was held by all the Court upon Evidence to a Jury, that if the Plaintiff give in Evidence any Matter in Writing or Record, or a Sentence in the Spiritual Court, (as it was in this Case) and the Defendant offers to demur thereupon, the Plaintiff

tiff ought to join in the Demurrer, or wave the Evidence, because the Defendant shall not be compelled to put Matter of Difficulty to *lay Gens*, and because there cannot be any Variance of a Matter in Writing. But if either Party offer to demur upon any Evidence given by Witness, the other, unless he pleaseth, shall not be compelled to join, because the Credit of the Testimony is to be examined by a Jury, and the Evidence is uncertain, and may be enforced more or less; but both Parties may agree to join in Demurrer upon such Evidence. And in the Queen's Case, the other Party may not demur upon Evidence shewn in Writing or Record for the Queen, unless the Queen's Council will thereto assent; but the Court in such Case shall charge the Jury to find the Matter specially, as appears 24 H. 8. *Dyer* 53. But this is by Prerogative. *Vide Lib.* 4. 104. the same Case, and 1 *Inst.* 72. where my Lord *Coke* says, If the Plaintiff in Evidence shew any Matter of Record, or Deeds, or Writings, or any Sentence in the Ecclesiastical Court, or other Matter of Evidence by Testimony of Witnesses, or otherwise, whereupon Doubt in Law ariseth, and the Defendant offer to demur in Law thereupon, the Plaintiff cannot refuse to join in Demurrer, no more than in a Demurrer upon a Count, Replication, &c. and so *è Converso* may the Plaintiff demur in Law, upon the Evidence of the Defendant, but the King's Council shall not be enforced to join in Demurrer; but in that Case the Court may direct the Jury to find the special Matter. So that the several Sorts of Evidence make no Difference

Joinder in
Demurrer.

Difference as to the joining in Demurrer. 1 Part, *Leon.* 206.

Darroſe againſt *Newbott*, *Cro.* 4 *Car.* f. 143. In Error of a Judgment in *Bridgwater*, the Error assigned was, for that, in an Action upon the Caſe *ſur Affumpſit*, the Parties being at Iſſue, a Demurrer was joined upon the Evidence, and thereupon the Jury diſcharged, and afterwards Judgment was given for the Plaintiff, and a Writ of Inquiry of Damages awarded, and Damages found, and Judgment thereupon; where the Jurors which came to find the Iſſue, although by the Demurrer they were diſcharged of the Iſſue, yet ought to have aſſeſſed Damages conditionally, if Judgment ſhould be given for the Plaintiff. And in Proof thereof, was cited *Newis* and *Scholastica's* Caſe, *Plowd. Com.* f. 408. and the old Book of Entries, &c. And it was ſaid by the Court, if theſe Precedents be good Law, then it may be inquired of by the ſame Jury conditionally: But it may be as well inquired of by a Writ of Inquiry of Damages, when the Demurrer is determined, and the moſt uſual Courſe is, when there is a Demurrer upon Evidence, to diſcharge the Jury, without more Inquiry. But as my Lord Chief Baron *Montague* held at the Aſſizes in *Cambridgſhire*, 1612, it may be one Way or other.

Note; He that demurs upon Evidence, admits the Evidence to be true.

In the Aſſize by *R. Newis* and *Scholastica* his Wife againſt *Lark* and *Hunt*, which was taken by Default; the Precedent in *Plowd. Com.* as to this Matter runs thus,

‘ Recogn’ Aſſiſæ præd’ exacti venerunt qui
‘ ad veritatem de præmiſſis dicend’ electi triati
‘ & jurati

& jurati fuerunt super quo *Willielmus Ben-*
lows Serviens ad legem de consilio prædicto-
 rum *R. & Scholasticæ* in manutentione Assisæ
 prædictæ coram Justic' Dom' Reg' de Banc'
 hic in evident' Recogn' Assisæ præd' dixit
 quod diu ante diem impetrationis Assisæ præd'
 quidam *H. Clark* fuit seiscitus, &c. Et condi-
 dit testamentum & ultimam voluntarem suam
 in scriptis inter alia unde pars inde in hiis
 Anglicis verbis sequitur videlicet [*Also this is*
the last Will and Testament of me the said
Henry Clark, for and concerning, &c.] Et
 ulterius idem Serviens ad legem ex parte præd'
R. & S. dedit in evident' eisdem Recognit'
 quod, &c. Quorum prætextu idem Servi-
 ens ad legem exigit quod iidem Recogn'
 Assisæ præd' Assisam præd' de tenementis præ-
 dictæ cum pertin' in visu, &c. pro parte ipso-
 rum *R. & S.* triari & comparere debeant,
 &c. Et veredictum suum dare debent quod
 præd' *W. Lark & J. Hunt* dictos *R. & S.* de
 tenementis præd' cum pertin' in visu, &c.
 disseisiverant, &c.

Et præd' *W. Lark & J. H.* in propriis
 personis suis dic' quod evident' & allegation'
 prædictæ ex parte præd' *R. & S.* superius al-
 legat' minus sufficien' in lege existunt ad
 manuten' Assisam præd' ad quos ipsi necesse
 non habent nec per legem terræ tenentur re-
 spondere unde pro defectu sufficient' Evident'
 in hac parte pet' Judicium quod Juratores
 præd' de veredicto suo in præmissis dicend'
 exonerentur, &c. Et quod præd' *R. N. &*
S. ab Assisa sua præd' habend' præcludan-
 tur, &c.

Et

Nota.

• Et præd' R. & S. dicunt quod ex quo ipsi
 • sufficien' materiam in manutentione Affisæ
 • præd' in Eviden' recognit' præd' ostend' quam
 • quidem materiam præd' *W. Lark & J. Hunt*
 • non deducunt nec ad eam aliqualit' respond'
 • petunt Judicium & quod iidem Jurator' inde
 • exonerentur, & quod præd' *W. & J.* de Af-
 • fisa illa convincantur, &c. Super quo dict' est
 • Recogn' præd' quod inquir' quæ dampna
 • præd' R. & S. sustinuer' tam occasione dissei-
 • sinæ prædict' quam pro misis & custagiis suis
 • per ipsos circa sectam suam in hac parte appo-
 • sit' si conting' Judicium pro iisdem R. & S. in
 • placito præd' super evidencias prædict' reddi
 • Qui quidem recogn' dicunt supra sacram suum
 • quod si conting' Judicium in placito præd'
 • pro præd' R. & S. super Evidencias prædict'
 • reddi, iidem R. & S. sustinuer' dampna occa-
 • sione disseisinæ præd' ad 13s. 4d. & pro
 • misis & custagiis suis ad 20s. Et quia Justi-
 • ciarii hic se advisare volunt de & sup' præ-
 • missis priusquam judicium inde reddant, dies
 • datus est partibus prædict' &c.

Note; Several Exceptions were taken to the
 Manner of giving the Evidence; First, For
 that the intire Will was not shewed, but Part,
 and that this being the Foundation of the
 Evidence, the whole Will ought to have been
 shewed; for there might be some other Matter
 of Substance, as a Condition, Limitation, &c.
 in the Parts not shewed. But all the Justices
 disallowed this Exception, and said, the Party
 in any Title or Bar needs shew no more than
 what makes for him. As in an Act of Parlia-
 ment, in which are divers Branches, 'tis suffi-
 cient to shew that Branch which serves one's
 Purpose,

Purpose, and not like the Case of a Fine or Recovery of twenty Acres, where I must shew the whole Record, although I am concerned but in one Acre, because the Original is intire, and so is the Record grounded upon it. See also *Fulmerston and Steward's Case, Pl. Com.* 102. Another Exception was, That the Fine was not shewed under the Seal of the Court, or the Great Seal, but one Part indented of the Chirograph was only shewn, which the Jurors were not bound to believe, because it wanted a Seal. But all the Justices were against this, and said, the Jury might find the Fine of their own Knowledge, without the shewing of the Parties, or they might find it upon the Credit of any Witness that had seen it, and the shewing the Part indented, is the usual Evidence of a Fine. (*Note* ; A Fine indented, and not exemplified under Seal, &c. shall not be delivered to the Jury. 34 H. 6. 25.) And they said, because it is only the Inducement of the Verity to the Jurors, the Party could not demur upon this ; for the Effect of the Matter is, that there is such a Fine which is amongst the Records : And this is the Substance of the Matter, and the Part of the Chirograph is nothing but the Image of the Verity, and therefore there could be no Demurrer upon this.

Another Exception was, That the Recovery was not shewed under Seal, or at least that the Roll of this ought to be alledged certainly ; but all the Court (except *Harper*) answered, That upon the General Issue, the Jury might find Things that proved or disproved the Seisin or Disseisin, be they Matters of Record or otherwise, and the Jury could not give a rightful Verdict, if they could not find them ; and what-

Style 22.
White and
Pindar's Case.

Vide Roll.
Tit. Trial,
687.

soever they may take Conufance of themselves, may be given in Evidence by Words, or Copies, or other Argument of the Truth. 'Tis true, in pleading, a Man cannot make a Title by Record, without shewing the same under the Great Seal; and if a Record be pleaded in Bar, a Day may be given to bring in the Record under the Great Seal; but such Day cannot be given to bring in the Record upon Evidence, but the finding of it by the Jury is sufficient, and they may find it of themselves, although it be not shewed them in Evidence. But perhaps they shall not be bound upon *Pain of Attaint* to find it, if it be not shewed them under Seal; but nevertheless they may find it, and they do well if it be true. And by the same Reason that they may find it, they may take Instruction of it by any Circumstance, which induceth the Truth. (*Note*; If it be not necessary to shew the Record, and the Jury may find it without; yet 'tis not fit to be permitted to prove it in such a Manner, without shewing the Record, or a true Copy of it.) And the Demurrer upon Evidence goes to the Law upon the Matter, and not to the Verity, which is admitted, and the Effect in Law is denied; for if the Party will not confess the Truth of the Matter given in Evidence, then he ought so to say, and put it to the Jury to be tried; and if they find this, where it is false, *an Attaint lies*; but a Demurrer upon Evidence never denies the Truth of the Fact, but confesses the Fact, and denies the Law to be with the Party which shews the Fact.

As to a fourth Exception, for Want of alledging and averring, that *H. Clark* had not any other Issue Male than *John* and *F.* (upon a Limitation

a Limitation of a Remainder for Want of Issue Male of *H. C.* and a Title made to the Plaintiff's Wife, under that Limitation;) the same Judges answered, That which the Plaintiff gave in Evidence, is to the Intent to perswade the Jury that they have a good Title, and what they say shall be applied as they intended; and as by Presumption, no Man will say any Thing against himself, so it lies on the other Side to shew what is against him; and although in Pleading, Certainty ought to be shewed, (to which the other Party must answer, and upon which the Court may judge) yet in Evidence, so great and exact Certainty is not requisite; for the Jury may found their Verdict, (if the Matter be ambiguous) upon what is most probable, and by the same Reason that which is most probable, is good Evidence, and therefore it shall be intended that *H. C.* had no other Issue Male, because the other Party did not shew that he had.

The *Precedent* of a Demurrer upon Evidence in *Reniger* and *Fogassa's* Case, in *Plowd. Com. f. 1.* In an Information upon a Seizure of Wood imported, the Customs not being paid, nor any Agreement made with the Collector in the Exchequer, where the Issue was, whether the Defendant made an Agreement with the Collector of the Subsidies for the Wood, according to the Act, &c. or not.

‘ Ideo fiat inde inquis. ac pro eo quod idem
 ‘ *A. Fogassa* est Alien' natus videl' apud Civi-
 ‘ tatem Portus *Portugaliæ* in *Portugalia* sub
 ‘ obedientia præd' *Portugaliæ* Regis petit medi-
 ‘ etatem linguæ suæ, &c. *A. B. E. M. R. S.*
 ‘ &c. qui ad veritatem de præmissis dicend'

* electi triati & jurati dictus *A. F.* in manu.
 * rentione exitus præd' superius ad patr' juncti
 * & ad proband' exit' ill' pro parte ipsius *A.*
 * fore verum produxit præd' *Tbo. Wells* Collect'
 * Custom' & Subsid' Domini Regis in portu
 * villæ *Southampton* ac *J. S.* adtunc & adhuc
 * Clericum sive servient' ipsius *Tbo. Wells* in
 * dicto Offic' Collect' præd' nec non quendam
 * *J. D. Yeoman* ad testificand' præmissa in
 * placito ipsius *A.* spec' fore vera. Qui quidem
 * *Tbo. Wells* examinatus sup' sacram' suum co-
 * ram Baronibus hic præstitum in præmissis dicit
 * quod, &c. [*Here recite the Evidence.*]

Demurrer.

* Et præd' Attorn' Dom' Regis pro eodem
 * Dom' Rege dic' quod evidentie præd' supe-
 * rius dat' minus sufficien' in lege existunt ad
 * manutenend' seu proband' exit' pro parte ip-
 * sius *A. F.* superius ad patriam junct' unde ob
 * insufficient' earundem evident' ac ex quo per
 * evidencias illas non deditur forisfactura bo-
 * norum præd' in informatione præd' spec' idem
 * Attorn' Dom' Regis pro ipso Dom' Rege pe-
 * tit Judicium ac quod eadem bona remaneant
 * Domino Regi forisfacta juxta formam Statuti
 * præd. Et præd' *A. F.* dic' quod evidentie
 * præd' superius ex parte ipsius *A. F.* dat'
 * sufficien' in lege existunt tam ad manutenend'
 * & proband' exit' præd' pro parte dicti *A.*
 * *F.* superius ad patriam junct' quam ad exclu-
 * dend' Domin' Regem de aliqua forisfactura
 * bonor' præd' habend' Ad quas præd' Attorn'
 * Domini Regis pro ipso Dom' Rege minus suf-
 * ficienter respondit nec aliquod pro ipso Rege
 * allegavit unde idem *A.* pet' Judicium ac quod
 * præd' bona in dicta informatione spec' ei reli-
 * berentur

Joinder.

berentur quodque ipse quoad præmissa ab hac
Curia dimittatur. Ideo ad Judicium.

Note; In this Case, the Agreement according to the Statute, was put in Issue generally, and yet the special Agreement maintained the Issue.

And wheresoever the Evidence doth not warrant, prove and maintain the very same Thing that is in Issue, that Evidence is defective, and may be demurred upon.

Upon *non est factum* to a Bond dated at *Non est York*: It was said in this Case, that to prove *factum*. the Bond made in another Place, doth not prove the Bond, nor warrant the Issue, because the Delivery is intended to be where the Date is; but the Witnesses cannot prove the contrary, and so the Issue is not proved. But surely, if this be found, the Plaintiff shall have Judgment as well as upon a Bond delivered before the Date. 31 H. 6. Pl. 7. Roll. Trial, 677. pl. 24. But Infancy, or made by Dures, cannot be given in Evidence upon *non est factum*, Lib. 5. Welpdale's Case, 119. because thereby the Bond is not void but only voidable: Otherwise of the Bond of a Feme Covert, or Monk, for there the Bond is void, and so *non est factum*; and so of a Bond made to a Feme Covert, and the Husband disagree to it, or by Husband and Feme, *non est factum* of the Wife.

In an Assize, if the Tenant plead *Nul tort*, Release. *nul disseisin*, he cannot give in Evidence a Release after the Disseisin; but a Release before the Disseisin he may, for then there is no Disseisin upon the Matter. 1 Inst. 283.

Warranty.

In a Writ of Right, if the Tenant join the Mife upon the meer Right, he cannot give in Evidence a collateral Warranty, for he hath not any Right by it, and therefore it ought to have been pleaded. 1 *Inst.* 283.

Regula.

Regularly, whatsoever is done by Force of a Warrant or Authority, ought to be pleaded.

But *Note*; In all Cases where one cannot have Advantage of the special Matter, by Way of Plea, there he may have Advantage of it in Evidence; as for Example, the Rule of Law is, *That one cannot justify the Death or Killing of a Man*; and therefore if one kill another in his own Defence, he cannot plead this specially; but he may give this in Evidence: And so in Defence of his House against Thieves and Robbers, &c. 1 *Inst.* 283.

Sewers.

By the Statute 23 *H. 8. cap. 5.* any Thing done by the Authority of the Commission of Sewers, may be given in Evidence upon the General Issue. 1 *Inst.* 283.

Regula.

After taking the General Issue the Defendant cannot give in Evidence any Thing that goes in Discharge of the Action; as in Debt upon *Nil debet*, he cannot give in Evidence a Release, nor a Grant to cut Trees to repair, upon *Nul wast fait*, nor making of a Ditch to amend the Meadow: But that he only lopped the Trees, he may, if Waste be assigned *in succidendo Arbores*, &c. Neither if a Statute was made, That all Tenants for Life should be dispunishable of Waste, could he give in Evidence this Statute. 28 *H. 8. Dyer* 28. for the Discharge ought to be pleaded, because it admits a Cause of Action without it,

Statute.

In an Issue upon Villenage *regardant* to Villenage.
a Manor, a Villein in *gross* is no Evidence.

Dyer 48.

In Waste by the Grantee of a Reversion, Attornment.
by *Montague* and *Fitz.* the Lessee may plead
that he in Reversion *ne granta pas per le fait*,
and give in Evidence, that he never attorned,
or he may traverse the Attornment at his Elec-
tion. *Dyer* 31.

In Rescous by the Lord, upon Not guilty, Rescous.
the Defendant shall not give in Evidence, That
he doth not hold; by *Vavasour* and *Bryan*;
and so if he said *Nothing is behind* in Avowry, Avowry.
he shall not give in Evidence that he doth not
hold of him. *T. 9 H. 7. 3.*

In Assize, Feoffment pleaded, the Plaintiff Feoffment.
said he did not *infeoff modo & forma*, upon the
Deed and Letter of Attorney to infeoff upon
Condition found, if the Attorney made it with-
out Condition, this well proves the Issue for
the Plaintiff. *13 E. 4. 4.*

If one plead a Feoffment *jointment* with his
Companion, or of a Feme Covert, the other
may say *Ne enseoffa pas*, and give the Matter in
Evidence, and the Court shall instruct the Jury
of the Law. *18 E. 4. 29.*

*Evidence which is contrary to that in Issue, or Regula.
which is not agreeable to the Matter in Issue, is
not good.*

As appears by several Cases which you may
find in the Chapter of *Evidence*. As upon the *Chap. 15.*
Issue, *Nothing passes by the Deed*, you cannot
give in Evidence, that it is not your Deed, for
this is contrary to the Issue, and to that which
is acknowledged in the Plea by Implication.
5 H. 4. f. 2.

And so upon Not guilty in Assault and Battery, and Evidence that it was done in his own Defence, is not good.

And so in Debt upon a Bail Bond, you must plead, That there is not the Name of the Sheriff in it, *Et essent nient son fait*, and cannot give in Evidence upon *Non est factum*, for it is contrariant. 5 E. 4. 5.

Roll, Trial,
680. pl. 2.
Regula.

So upon Issue of Common appendant, Common *pur Cause de vicinage* is not agreeable to the Matter in Issue, and therefore cannot be given in Evidence. 13 H. 7. 13.

Where the Evidence proves the Effect and Substance of the Issue, it is good.

Other Cases
of Evidence.
Maintenance.

As to prove a Grant or Lease pleaded *simplement*, a Grant or Lease upon Condition, and the Condition executed, is good; for this proves the Effect and Substance of the Issue, 14 H. 8. 20. So a Promise to the Wife, and the Husband's Agreement, proves a Promise to the Husband; and this you may see in many Cases in the Chapter of Evidence in p. 517.

Justifiable Maintenance cannot be given in Evidence upon the General Issue, but must be pleaded. The Master may justify for his Servant. Any Man for his Kindred, &c. or to give Money to the Poor, &c. But that he was of his Council may be given in Evidence upon the General Issue; for to give Council, is not Maintenance. 22 H. 6. 35. 28 H. 8. 6.

A Witness
may prove
the Contents
of a Deed or
Will.
Vaughan's
Rep. 77.

In an Issue upon a Prescription traversed, the Plaintiff gave in Evidence a Deed, bearing Date after the Time of Limitation, *scil.* after the Time of R. 1. And the Defendant would have Demurred in Law upon it, and well he might; *per Cur.* Whereupon the Plaintiff would

would not give this in Evidence, but gave other Evidence. 34 H. 6. 37. See Chapter *Evidence*, where a Grant shall be taken as a Confirmation of a Prescription.

Note; The Opinion 12 H. 4. 21. That a Deed made before the Time of Memory, may be given in Evidence, although it cannot be pleaded. Ancient Deeds.

Vide Repl. in Fitz. 34. Repl. of a Sow and Pigs; the Defendant justified for the Sow; and to the Pigs pleaded, he did not take them; the Jury found that the Sow was with Pig when she was taken, and after cast her Pigs in the Custody of the Defendant; and the Plaintiff recovered Damages: For says *Bro. Abridg. Tit. General Issue*, 88. This is a special Taking in Law. Sow pigged, being taken in Distress.

It sufficeth to prove the Substance, without any Regula. precise Regard to the Circumstance. As if an Indictment be, That with a Dagger the Offender gave another a mortal Wound, &c. And in Evidence it is proved to be done with a Sword, Rapier, Club, Bill, or any other Weapon, the Offender upon this Evidence ought to be found guilty; for the mortal Wound is the Substance, and the Manner of the Weapon is but the Circumstance; yet some Weapon ought to be mentioned in the Indictment. And so if *A. B.* and *C.* be indicted for killing *J. S.* and that *A.* struck, and the other were Abettors; to prove that *B.* struck, is sufficient, &c. Substance. Circumstance. Indictment.

Manlaughter upon an Indictment must be found, if proved, because the Killing is Substance, upon which Judgment shall be given.

Indictments for Murder of Ministers of Justice in Execution of their Office, may be general, viz. That the Prisoners *felonice, voluntarie*

luntarie & ex malitia sua præcogitata, &c. percusserunt, &c. without alledging the special Matter, which may be given in Evidence, for the Law implies malice prepensed. So if a Thief in robbing kills a Man that resists him, or a Man is killed without any Provocation, or without Malice prepensed that can be actually proved, the Law adjudges this Murder, and implies the Malice; and in these Cases, the Offenders may be indicted generally, That they killed of Malice prepense; for the Malice implied by Law, given in Evidence, is sufficient to maintain the general Indictment. *Lib. 9. 67. Mackalley's Case.*

So if an Indictment as Accessary to two, to prove Accessary to one, is sufficient. *Lib. 9. 119.*

In *Cromwel's Case*, *Lib. 4. 12.* Although it was objected, That in an Action of Slander, if the Defendant will justify, he must justify the same Words, and in the same Sense, as is laid in the *Nar'*, or else he must plead Not guilty, and give the special Matter, that is the Variance, in Evidence. Yet the Court held, That the Defendant should not be put to the General Issue, but might justify, although he varied from the Plaintiff in the Sense and Quality of the Words; and might set forth the coherent Words. As for calling the Plaintiff Murderer, the Defendant may shew that they were speaking of Hares, and the Words were spoken in Reference to killing of Hares.

Copyhold.

In *Pilkington's Case*, *Style*
450.

Upon the Issue, if the Lord of the Manor granted the Lands *per Copiam rotulorum Curie manerii præd' secundum consuetudinem manerii præd'*;

præd; to prove that there were customary Lands in the Manor, and that the Lord of late granted the Land, &c. *per copiam Rotulor. Curie*, where it was never granted by Copy before, is no good Evidence to find the Custom, or that the Lands, &c. were grantable or demisable by Custom. *Leon. 55. Kemp and Carter's Case.*

Rolls said, if Copies of Court-Roll be shewed to prove a Customary Estate, the Enjoyment of such Estates must also be

proved, otherwise the Proof is not good.

Forger of a Deed, in which is contained a Forger. Demise of the Scite of the Manor of R. and *Totum & pars.* *terras dominicales*, &c. A Deed of the Scite and all the Demesnes of the said Manor, *exceptis duabus clausuris*, &c. is good Evidence; for it is not necessary to construe *terras dominicales*, &c. *omnes terras dominicales*, &c. for Lands not excepted are *terre dominicales*; and so the Court is satisfied by that Evidence. 1 *Leon* 139. *Atkins and Hale's Case.*

In a Replevin, the Taking was supposed in No Evidence R. The Defendant said, That the Place where is forty Acres, Parcel of the Manor of R. to be given against what is admitted upon the Record. which is his Freehold, and avowed for Damage-feasant; the Plaintiff said, That the Place where is Parcel of the Manor of R. in R. and conveyed Title to himself in that; *Absque hoc*, that the Manor of R. *unde*, was the Freehold of the Defendant. It was the Opinion of the Justices, that the Plaintiff is estopped to give Evidence that the Defendant had not any Manor of R. for the Words *absque hoc* and *unde* imply he had such a Manor, but he ought to have taken it by Protestation, that the Defendant had no such Manor of R. in R. *absque hoc*, that the forty Acres were the Freehold of the Defendant. *Dyer* 183.

Where

Estoppel.

Where a Man is estopped in Pleading, to speak against his own Deed, yet he shall not in Evidence; as in *Isebam's Case* against *Morris*, *Cro. 4 Car. 109*. Upon Evidence at Bar, it was held by all the Justices of the Common Pleas, That where one makes a Lease for Years of Land by Indenture, and hath nothing in the Land, and afterwards purchaseth the Land and aliens it; although it be a good Lease for Years by Estoppel against him and his Alienee, by way of Pleading, and shall bind them, yet it shall not bind the Jury, but they may find the Truth; and if they find the Truth, the Court shall adjudge it to be a void Lease. *Vide tamen Rawlin's Case Lib. 4. 53. Sutton and Dicken's Case, Leon. 1 Part, f. 206. 1 Inst. 47. 227. Edwards against Omellballum, March 64. James and Landon's Case, Cro. 27 Eliz. f. 36. Leon. 3 Part 210. Bull. 2 Part 41.*

Demurrer.

Note; That if a Demurrer be made upon the Evidence, the Evidence ought to be entered *verbatim*, *Keilway 77*. where in Account against one generally as Bailiff, the Evidence that charged him specially by Reason of his Tenure to collect, &c. was upon Demurrer held not good.

Surplusage.

Matter of Surplusage shewed in Evidence shall not hurt. *Keilway 166*.

Will.

Issue was upon a Devise to *A. Harding* and her Heirs, *modo & forma*, and the Will given in Evidence was, *A. H. shall have all my Inheritance if the Law will allow it*; and held sufficient to maintain the Issue. *Hob. 2*. So upon *Ne unques receiver per Mains J. S. a Delivery from J. D. by the Appointment of J. S. to the Plaintiff's Use*, is good Evidence. *Hob. 36*.

Account.

Issue

Issue whether *A.* was taken by a *Capias ad Arrest.* *fat.* at the Suit of *B.* and Evidence of a Taking at the Suit of *C.* and then a Delivery of a *Capias ad fat.* at the Suit of *B.* to the Sheriff, is good. *Hob.* 55. But a Taking upon a *Capias utlagat.* or *Capias pro fine*, with a prayer of the Plaintiff, that he remain for his Satisfaction, is not. *Ibid.*

In a *Consimili casu*, where the Demandant *Consimili casu.* counts of an Alienation in Fee, yet the Defen- *Substantia.* dant shall make his Traverse to the Alienation *modo & forma*; and then the Demandant shall maintain the Issue by an Alienation in Fee, or in Tail, or for Life, for they are all alike material. *Hob.* 105.

In an Assize, the Defendant pleaded the Warranty. Deed of the Brother of the Plaintiff with Warranty; a Deed of the Father with Warranty, will not maintain the Defendant's Issue. *Hob.* 55.

In an Action on the Case, for digging a Demurrer Hole in the Highway, into which his Gelding upon Evi- fell, &c. upon Not guilty, this Evidence *dence.* given, that the Plaintiff's Servant was driving the Plaintiff's Gelding in the Way, and that by Reason of the Hole he fell, &c. Upon which it was demurred, because it was not proved that there was such a Highway, or who digged the Hole. *Rolle* Chief Justice, That Evidence is no more than a special *Action sur* Verdict, and it ought to find the Way and *Case.* the Hole digged, and all the Matter conducing to the Issue, and therefore it is not good as it is, and a *Venire de novo* was awarded. *Style* 335.

Demurrer
upon Evi-
dence.

Record.

Deed.

In Trover and Conversion, there was a Demurrer joined upon the Evidence, and thereupon the Court directed the Jury to find Damages for the Plaintiff, if upon the Argument of the Demurrer, the Law should be adjudged for him; and then the Parties desired the Jury might be discharged, and referred the Matter to the Judges, to determine the Law upon the Evidence. In this Case *Rolle* Justice took this Difference: If a Record be pleaded, it must be *sub pede sigilli*, or else the Judges cannot judge of it; but it may be given in Evidence, and the Jury may find it, though it be not *sub pede sigilli*. And the Court advised the Parties, for their own Expedition, to let a *Venire facias de novo* be issued out, and to waive the demurrer upon the Evidence, because it was not good, nor could not bring the Matter in Question before them, that they might determine it; for one Party says there is a Writ, and the other saith there is not a Writ, which is bare Matter of Fact for the Jury to determine, and not for the Court; and the Demurrer ought to have been, whether the Writ be good or bad, and should have admitted that there was a Writ *tiel quel*; and then had the whole Matter come legally before the Court, to wit. Whether the Evidence given to the Jury be sufficient for them to find a Verdict for the Plaintiff, upon the Issue joined, or not? for the Matter of Fact ought to be agreed in a Demurrer to an Evidence, otherwise the Court cannot proceed upon the Demurrer. And he said, if a Deed be pleaded, the Party must shew it in Court; but in Evidence, it is not absolutely necessary to shew it, if it can otherwise be proved to the Jury, and

and so it is of a Record; and concluded, that the Demurrer was not good, and that there ought to be a *Venire facias de novo* to try the Matter again. *Bacon* Justice said, there ought not to be a *Venire facias de novo*, but that Judgment ought to be given against one Party, to wit, the Defendant, for ill joining in the Demurrer, to the Intent the Party that is not in Fault may be dismissed; and the Parties here have waved the *Trial per Pais*, by joining in the Demurrer. But *Rolle* answered, That no Judgment at all could be given, for both Parties be in Fault, one by tendring the Demurrer, and the other by joining in it; and the Defendant might have chosen whether he would have joined or not; but might have prayed the Judgment of the Court, whether he ought to join? The Court advised to search Precedents for a *Venire facias de novo* after Demurrer upon an Evidence; and if there be any, they hold that the same Jury ought to come again, and not another. *Rolle* said, If a special Verdict be found insufficient, a new *Venire facias* ought to issue; and he saw no Difference between that and this Case. *Wright* and *Pindar's* Case, *Style* 22 and 34.

Where the Issue is not perfect, no Evidence can be applied, neither can the Justices of *Nisi* ^{Imperfect} Issue. *prius* proceed to the Trial of such an Issue. As whether the Money be paid after the Date of the Obligation, and the Date was left out and did not appear in the Record. *Brown* 2, 47.

Note; If there be a Demurrer, yet there may be a Plea *puis darrein Continuance*; and if the Plaintiff take Issue, or demur to this Plea, yet the Court must also consider of the ^{*Plea puis dar-*}
^{*rein Continu-*}
^{*ance.*}
first

first Demurrer; for if upon that standing confessed by the Demurrer, the Plaintiff could not have his Action, the Court cannot give Judgment for him, howsoever the latter Issue or Demurrer pass. But otherwise if the first had been an Issue; for then nothing were confessed to his Prejudice, and then that had been utterly relinquished by a second Issue, or Demurrer. *Hob. 18.* with a *Quere, &c.* When this Plea is pleaded, the Justices of *Nisi prius* cannot proceed to take the Inquest, neither can the Plaintiff reply there, but in Bank. *Bulstr. 92, 93.*

Of Averments.

Averment.

And in regard what may be averred, may be proved and given in Evidence, it will not be impertinent to draw a short Scheme of Averments.

Averment
had upon or
against a
Deed.

To alter, qualify, or abridge the Operation of it, if there be any apt Words in the Deed, whereupon to ground it. As a Grant to *A.* the Son of *B.* and he hath two Sons of that Name, of the Manor of *S.* and he hath two Manors of that Name, which Son or Manor was intended may be averred. And so may

Consideration.

a Consideration of a Deed that is besides, but not that is against the express Consideration of the Deed; nor can any Thing against the Words of the Deed either enlarge or restrain it.

Uses.

Nor can a Use against or besides the express Uses in the Deed; but where no Use is expressed, or incertainly expressed, it may; and also to reconcile a Fine, and the Indentures to lead the Uses of the Fine. *Lib. 2. 75.*

But

But when a Deed is utterly incertain, no Averment shall help it. As a Grant to one of the Sons of J. S. to two & *Hæredibus, &c.*

An Estate to a Woman for her Life may be averred to be made for her Jointure, *Dyer* 146. Upon or a-
lib. 4. 4. And that the Thing granted to me gainst a Re-
by a new Name, is all one Thing with that cord.
which hath another, or an old Name. *Dyer* 37.
44.

A thing that is against or besides a Record, or any Thing that is within it, shall not be averred; therefore the Date of a Recognizance expressed to be taken at *Dale* cannot be averred to be taken at *Sale*. But such an Averment as may stand with the Record may be admitted. As that the Fine was before the Inrollment (being both in one Term,) the A Fine taken
Uses of a Fine or Common Recovery may be by R. M. Esq;
averred; or what, or who was meant, where and returned
there are two of a Name, &c. *Lib.* 8. 155. by R. M. Mi-
The Heir in Tail cannot aver against a Fine litem upon
levied by his Ancestors, That *partes finis nihil* the Record
habuerunt, *Lib.* 3. 84, 85. *Leon.* 75, 76, &c. not to be a-
But when Tenant in Tail accepts of a Fine, verred against
and grants and renders the Land by the same in Error
Fine, which is executory; there, if no Ex- Yelv. 33.
ecution be sued in the Life of Tenant in Tail, Cro. 2 Part
his Issue may aver Continuance of Possession, 11.
&c. in his Father; for this stands with the
Fine, and the Acceptance of the Fine alters
not the Estate.

If a Man and his Wife sell her Land for Money, and after levy a Fine to the Vendee and his Heirs, it may be averred it was for Money, and so carry the Use to the Vendee, without any Declaration of Use, which otherwise would result to the Woman and her Heirs:

And so other Uses may be proved, than what are in an Indenture of Uses subsequent to the Conveyance, &c. *Lib. 9. 8. 5. 26.*

Tenant in Tail with Remainder in Tail to *A.* Reversion in Fee to himself, bargains and sells Land, &c. and levies a Fine to him with Proclamation, with general Warranty. The Conusee infeoffs *A.*

Resolved, The Bargainee had an Estate determinable upon the Death of the Tenant in Tail, (and also the Reversion in Fee, which the Bargainor had) and his Wife shall be endowed; but this determines upon the Death of the Tenant in Tail.

Resolved, the Fine doth not discontinue the Remainder, for this doth not pass any Estate, but this Estate of the Bargainee is durable, &c. so that it shall not determine until the Tenant in Tail die without Issue; and the Conclusion may be confessed and avoided.

Resolved, That Warranty doth not bar the Remainder; for this was annexed to the Fee determinable, &c. and to the Reversion in Fee, and doth not extend to the Remainder, for the Conusee cannot enlarge, &c. It is a Maxim, that a Warranty bars no Freehold, which is *in esse*, Possession or Remainder, &c. and not displaced before, or that the Time of the Warranty, although it be devested before the Descent.

Resolved, a Warranty cannot enlarge the Estate.

Resolved, The Feoffment of the Conusee was not a Discontinuance of the Remainder, because he was not Tenant in Tail; so of the Grantee of *totum statum suum*, &c.

Resolved,

Resolved, A collateral Warranty may be given in Evidence, and found by the Jury.

The Chief Justice held, That by the Feoffment of the Conusee, the Remainder was not displaced, nor put to a Right, for his Fee-simple and his Fee determinate pass; and the Feoffment, which in itself is not tortious, cannot be tortious to another. Otherwise it is when Tenant for Life, or Remainder in Tail, &c. makes a Feoffment, for the Feoffment itself is tortious.

Note; There are some Titles to which a Warranty doth not extend; as in the Case of an Exchange, Condition upon a Mortmain, Consent to a Ravisher, &c. for in these Cases no Action lies, in which Voucher or Rebutter may be; neither shall a Descent take away Entry in these Cases, and cannot be displaced out of their original Essence. Collateral Warranty shall bar Dower, and yet an Action is given for this. But a Fine, &c. and five Years bar these Titles and Dower also, if an Action be not brought in Time. *Seymour's Case, Lib. 10. 96.*

Buckler and Harvey's Case, Lib. 2. 55.

Tenant for Life leases for four Years, and afterwards grants the Lands to C. from *Midsummer* next for Life; after the Feast the Lessee for Years attorns, then the Grantee enters and leases at Will; to which Tenant at Will the Tenant for Life levies a Fine *come ceo*, &c. Remainder in Fee enters.

Resolved, the Grant was void, for an Estate of Freehold cannot commence *in futuro*, and the Grant being void at the Commencement, the Attornment afterwards cannot make it pass; and that the Grantee was a Disseisor. But if

the Grant had been good at the Commencement, and was only to have its Perfection by a subsequent Act, as by Livery upon a Charter of Feoffment, &c. and the Grantee enter before the Perfection, he is not a Disseisor, but a Tenant at Will.

Resolved also, If the Fine had been levied to the Disseisor himself *come ceo*, &c. he which had the Right of Remainder, may enter for the Forfeiture; for it was agreed that the Right of a particular Estate may be forfeited, and Entry given to him who had but a Right. As if Lessee for Years be ousted, or Tenant for Life disseised, and the Lessee for Years brings an Affize, or the Lessee for Life a Writ of Right, &c. it is a Forfeiture.

Resolved also, That the Fine being levied to the Tenant at Will, it is a Forfeiture, and he which had Right of Remainder may enter, and the Tenants for Life and at Will also shall be estopped to say, *quod partes finis nihil hab.* &c. and of such Estoppels which are by Matter of Record, and trench to the Disherison of them in Reversion, &c. they shall take Advantage although they are Strangers to the Record, for they are Privies in Estate.

Resolved also, if the Disseisee levy a Fine to an Estranger, the Disseisor shall retain for ever; for the Disseisee against his own Fine cannot claim the Land, and the Conusee cannot enter, for the Right of the Conusor cannot be transferred to him; but by the Fine the Right is extinct, whereof the Disseisor shall have Advantage. But in *Croke*, 1 Part 482. 13 *Car.* it was moved, If the Disseisee, not knowing of the Disseisin, levied a Fine to a Stranger, whether that should bar his Right, and

and move to the Benefit of the Disseisor, according to *Buckler's Case*; and said, if admitted, it would be of very mischievous Consequence; and by two Judges held, That it should not enure to the Benefit of the Disseisor, but to the Use of the Conusor himself; for otherwise a Disseisin being secret may be the Cause of Disherison of any one who intends to levy a Fine for his own Benefit, for Assurance of his Lands upon his Wife and Children, or otherwise. 1 *Inst.* 277.

Not against such Certificates as are a definitive Trial of the Thing certified, as the Bishop's Certificate. Against a Certificate of Excommunication, Bastardy, lawful Marriage, &c. So Certificates of the Marshal of the Host, which is a Trial; but against Certificates only of Information it may be: As against Certificates upon Commission out of any Court, or of the Commissioners that affirm a Man a Bankrupt, which are not triable in a Course of Law, but Informations. *Lib.* 7. 14. *Lib.* 8. 121.

So of a Return, if it is a definitive Trial of the Thing returned, no Averment lieth against it. Upon a Return. As the Return of a Sheriff upon some Writs, as a Writ of Partition, *Elegit*, and of *Hab. Corp.* from a Mayor, &c. But if the Return is not definitive, as upon a Rescous, &c. an Averment doth lie; and upon this you may go to Trial: So if there be a Return to endanger a Man's Life, or his Inheritance, an Averment may be had against it. *Dyer* 348. 117. So it lieth against the Returns of Bailiffs of Franchises, so that the Lords be not prejudiced in their Franchises thereby. *Goldsb.* 129, 139. *pl.* 23.

In Action for a false Return, an Averment doth lie against the Sheriff's Return, *Winch* 100. and so it doth in any other Action, than in that the Return was made.

Upon or against a Will or Administration, it lieth altho' they be under Seal of Court.

Any Averment may be upon a Will, or any Part of it that may help to expound it; and of such a Thing that may stand with the Will, and may be collected out of the Words. As which Son he meant, *Ec. Lib. 8. 31, 41.* But no Averment against or besides that which is expressed in the Will, or which cannot be gathered to be the Mind from the Words, nor of any Thing that doth not cohere with the Will; especially if it be about Lands, as in the Lord *Cheyney's* Case, *Lib. 5. 68.* A Devise to *A.* and the Heirs of his Body, the Remainder to *B.* and the Heirs male of his Body, on Condition, *that he or they, or any of them, shall not alien, Ec.* no Averment shall be taken to prove by Witnesses or other Evidence, that the Devisor intended to include *A.* within this Condition, by the Words *he or they*; for the Construction of Wills ought to be collected out of the Words of the Will in Writing, and not by any Averment or Proof out of it.

Against Court Rolls, or upon them.

It lies against the Rolls or Records of County-Courts, Hundred-Courts, Courts-Baron. As that there is no such Record, or it is not as it is certified. *34 H. 6. 42. 9 E. 4. 4.*

Against common Presumption or Reason.

No Averment or Proof is to be admitted against common Presumption, as that there was more Rent behind, when the Acquittance of the last Rent was made. *1 Inst. 373.* Nor against common Reason, as that Common is appendant to a Meadow, or to a Messuage. *Plow. 170. Lib. 4. 37.*

If the Matter contained in an Award, and Upon an A-
the Matter in the Submission do not agree, it ward.
will hardly be supplied by an Averment. *Dyer*
242. 52.

If the Defeasance of a Recognizance be Date.
dated before the Recognizance, it may be
averred to be delivered at or before the Time
of the Recognizance entred into. *Perkin's*
Cafe, 147.

Things apparent, or necessarily intendable by
Law, need not be averred: *Manfesta non proba-*
tione indigent: Quod constat clare, non debet ve-
rificari. *Lib.* 11. 25. *Plo.* 8.

Chief Justice *Anderson* held, *Godbolt* 131. Devise.
That if one devise Lands to the Heirs of *J. S.*
and the Clerk writes it to *J. S.* and his Heirs,
that the same may be holpen by Averment,
because the Intent of the Devisor is written,
and more; and it shall be naught for that
which was against his Will, and good for the
Residue. But if a Devise be to *J. S.* and his
Heirs, and it is written but to the Heirs of
J. S. there an Averment shall not make it
good to *J. S.* because it is not in Writing,
which the Law requires; and so an Averment
to take away any Surplusage is good, but not
to increase that which is defective in the Will
of the Testator. But with Submission, if the
Law should admit of such Averments, it would
be as mischievous one Way as the other, and
no Man could know by the Words of the
Will, what Construction to make, nor what
Advice to give; but this shall be controuled by
collateral Averments out of the Will, and in-
stead of proving the Testator's Will, it would
be the destroying of it.

Partition.

If the Partition be by Writ, although it be unequal, yet it shall not be avoided by Averment, but shall bind the Feme Coverts. And such Averment against the Return of the Sheriff shall not be good. 1 *Inst.* 171.

Consideration.

A valuable Consideration in a Bargain and Sale not expressed, may be averred. 2 *Inst.* 672.

A Consideration which consists with the Deed, and not repugnant, may be averred; as in a Bargain and Sale, if a particular Consideration be expressed, and the general Clause of *other good Causes and Considerations*, or without that general Clause, yet other Considerations may be shewed: So if the particular Consideration be Love and Affection, yet Payment of Money may be shewed: so a precedent Intent of Uses, and to levy a Fine, may be shewed to guide the Use of the Fine. *Roll. Tit. Uses*, 790.

Uses.

As if I covenant by Deed to purchase Land, and then to levy a Fine, or make a Feoffment thereof to the Use of another, and afterwards purchase and levy a Fine, or make a Feoffment, this Use shall rise; for the Deed is an Evidence of the precedent Intent, and the Uses of a Fine or Feoffment may be directed by the precedent Intent, and yet such Intent is countermandable. But a Covenant to purchase and stand seised of Lands to Uses, shall not raise the Use after the Purchase, because the Use is to rise by the Deed, and at the Time when the Deed was made, there was no Estate in the Land. *Ibid.*

So if one Joint-tenant covenant to stand seised of his Companion's Part, if he survive, yet no Use shall rise if he did survive, because

at

at the Time of the Covenant, he could not grant nor charge the Land. *Ibid.*

'Tis true that a Fine *sur Grant & Render*, *Fine sur Grant* unless it be in special Cases, cannot be averred *& Render*.

by Parol to be to any other Use or Intent than what is expressed in the Fine, Feoffment, or other Conveyance: But there is a Diversity betwixt a Use and Consideration; for when a Fine, Feoffment, or other Conveyance, import an express Consideration, a Man may aver by Word another Consideration, which may stand with the Consideration expressed; but the Parties cannot by Parol aver any other Use than is contained in the same Conveyance. Also no Averment shall be against the Consideration expressed; but yet in some Cases a Fine *sur Grant & Render* may be ruled and directed in Part by Averment *per parol*: And this is when the original Bargain and Contract betwixt the Parties is by Indenture or other Deed; as where it is agreed by Indenture, that a Fine shall be levied of certain Lands, by the Name of a certain Number of Acres, to divers Persons, and that they shall grant and render the Land again in Fee-simple, which shall be to certain Uses, the Fine is levied of the Land; but there is some Variance betwixt the Number of Acres comprized in the Fine; or the Fine is levied to one of the Parties only, who grants and renders the Land, so that there is a Variance betwixt the Covenant and the Fine, either in the Number, Time, or Person, &c. yet this Fine shall be averred to be to the Uses in the Indentures. For the Intent of the Parties, and the Substance and Effect of their original Bargain and Agreement, is chiefly to be regarded in all Con-

veyances;

veyances; and therefore the Law allows an Averment by Parol, to reconcile the Fine and Indentures, although this Sort of Fine imports a Consideration in itself, and regularly by a naked Averment by Parol cannot be averred to be to any other Use or Intent, than is comprized in the Fine itself; but by Deed it may be. *Lib. 2. 77.*

And although the Fine be of so high a Nature, that it will not permit naked Averments against the Purport and Consuance of the Fine; yet when the Law requires one of Necessity, and for Conformity, to join with another in a Fine, the Law permits to shew the Verity of the Matter, to avoid Prejudice and Confusion. As where Baron and Feme an Infant levy a Fine, which is reversed for the Nonage of the Wife, the Baron and Feme shall have Restitution presently, and the Conusee shall not detain this during the Coverture; for all the Estate passes from the Feme, and the Baron joins for Necessity and Conformity; and therefore the Law permits that the Verity of this shall be shewed, and that the whole Estate shall be restored to the Wife, during the Life of the Husband. *Worsely and his Wife against Charnock, 30 & 31 Eliz. Lib. 2. 77.*

What may be averred *contra & præter* Records, Fines, Recoveries, Deeds, Wills, &c. is very requisite for a good Practiser to be ready in, and therefore I have here given this Taste, referring him to the Books at large, where he may see what Averments he in Remainder, the Heir in Tail, the Wife, her Heirs, Estrangers, Privies, Parties, &c. may have to Fines, Recoveries, &c. *Lib. 1. 76. Lib.*

Lib. 2. 77. Lib. 4. 71. Lib. 9. 140, 141. Lib. 2. 55. Lib. 2. 88. Lib. 10. 50, 96. Lib. 3. 51, 88. Lib. 4. 74, &c.

The Knowledge of Evidence is so beneficial and necessary for all Practisers in the Law, that none can know too much, be too well versed, or too often conversant in it. Therefore to compleat this Treatise, especially in this Particular, I have drained the Law Books of all, or the most principal Cases relating to it; and have added some Observations very fit for the Unlearned to know; and I hope not fit for the Learned to reject.

Note; The Chapter of Verdicts gives much Light to know what Evidence is good, and what not.

C H A P. XVI.

*Brief Observations relating to Trials in Capital Cases.**Accessary.*

1. **I**F the Principal be acquitted, or convict only of Manslaughter, or *se Defendendo*, or before Attainder hath his Clergy or Pardon, or die, the Accessary shall not be arraigned. So if the Principal stand mute. *Hale P. C. 221.*

2. If the Principal appears not, the Accessary shall not be tried, unless he will. *Ibid. 222.*

3. Where a new Felony is made by Statute, it seems that there is no Accessary, unless specially enacted. *Ibid. 223. Quere, for Co. 3 Inst. 72. is otherwise.*

4. A Man being acquitted as Principal, cannot be arraigned as Accessary; but if acquitted as Accessary, he may be arraigned as Principal. *Ibid. 224.*

5. Where there are two Principals and one Accessary, if one of the Principals be found Not guilty, the Accessary is discharged. *Co. 2 Inst. 183.*

Accessary to
be tried
when the
Principal is
pardoned or
admitted to
his Clergy.

By 1 *Annæ, cap. 9.* it was enacted; That if the Principal be convict of Felony, stand mute, or challenge peremptorily above twenty Jurors, the Accessary may be proceeded against as if such Principal Felon had been attainted, notwithstanding such principal Felon be admitted

ted to his Clergy, pardoned or otherwise delivered before Attainder.

Such Accessary being convicted, or if he stands mute, or challenge as aforesaid, shall suffer as if the Principal had been attainted. And suffer as if the Principal was attainted.

By 5 *Annæ*, cap. 31. it is enacted, That if any Person shall receive or buy knowingly any stolen Goods, or knowingly harbour or conceal Felons, he shall be taken as Accessary to the Felonies, and being convicted shall suffer Death as a Felon. Receivers of Felons or stolen Goods deemed Accessaries.

If the principal Felon cannot be taken, so as to be convicted, yet the Person buying stolen Goods, or receiving a Felon knowingly, may be prosecuted for a Misdemeanor, to be punished by Fine or Imprisonment, or other corporal Punishment, as the Court shall think fit; which shall exempt the Offenders from being punished as Accessary, if the Principal be after convict. Such Accessaries may be prosecuted before the Principal is taken.

Vide *Attainder* 3. *Bar* 1.

Accusation.

1. By the Statute 37 *E. 3. c. 18.* Promoters of Suggestions to the King were to incur the Pain which the Accused should suffer, in case the Suggestion hold not; but that Clause was repealed by 41 *E. 3. c. 9.* and the Penalty changed into Fine and Imprisonment, and Damages to the Party grieved.

Action.

1. Action lies after Trial and Acquittal (of Felony) for unjust and malicious Prosecution. 400*l.* Damages were recovered in the Common

Brief Observations relating Ch. 16.
 mon Pleas after Trial in the King's Bench.
 The Case of the five *Frenchmen*. *Vide* Lord
Hollis's Narrative, p. 42.

Appeal.

1. An Appeal for the Death of her Husband is prosecuted in the Office of civil Pleas in the King's Bench, and not in the Crown-Office; and the Woman may prosecute by Attorney, made by Warrant under Hand and Seal, acknowledged by the Party in Court, or proved by Witnesses. 2 *Jones* 210. *Warren* and *Verdon*.

2. Principal or Accessary in Murder being acquitted within a Year and a Day after the Fact, the Justices shall not let them go at large, but either remand them to Prison, or bail them till the Year and Day be up, in which Time the Wife or next Heir of the Party slain (whether the Offender be attaind or acquitted) may prosecute their Appeal, in Case the Benefit of Clergy hath not been allowed. The Appellant must commence the Appeal in proper Person, but may after appoint an Attorney to prosecute it (save only in such Cases where Battle lieth). *Stat. 3 H. 7. c. 1. sect. 15. & infra*.

3. No Man shall be taken or imprisoned upon the Appeal of a Woman for the Death of any other than her Husband. *Mag. Chart.*

c. 34.

Vide Particeps Criminis 1.

Arraignment.

Arraignment.

1. A Prisoner at the Time of his Arraignment ought not to be in Irons. *Hale P. C.* 212.

Quære.

2. After an Attainder of Felony, the Prisoner may be arraigned of Treason. *Ibid.* 231.

3. When the Defendant hath pleaded to the Indictment, *Not guilty*, the Clerk on Behalf of the King, or his Attorney General, by Way of Replication, says *Culprit, i. e. Culprist*, which is an Averment of his Guilt; and a taking of Issue thereupon, as much as *paratus est verificare quod Culpabilis est*; the like as in Civil Actions, *Et hoc paratus est verificare, prist* in French signifying the same with *paratus* in Latin; then the Prisoner being demanded how he will be tried, answers, *By God and the Country*, which is the same with a Rejoinder and joining Issue in a Civil Action, concluding *Et de hoc ponit se super Patriam*. So that upon all Arraignments, there is a Formality of Pleading observed, in Effect the same as in Civil Actions.

Vide Trial 6.

Arrest of Judgment.

1. Four Days are regularly given to move in Arrest of Judgment; but the Court may enlarge the Time if they please, and accordingly eight Days were given to *Oates*. *Oates's 2d Trial* 56, 57.

2. Of old Time the Party convicted had at least thirty Days, to shew some Matter to arrest Judgment, which now (says Sir *Ed. Coke*)
is

is gone *in dissuetudinem*; and great Expedition is now made in Pleas of the Crown concerning the Life of Man. *Sed de morte hominis nulla est cunctatio longa. Co. Lit. f. 134. b.*

Attainder.

1. Attainder may be falsified by the Party, by Writ of Error; or by others, as a Purchaser in some Cases, if he purchased before the Attainder, and after the Time of the Felony supposed. *Vide Hale P. C. 270.*

2. If the Attainder was by such as had no good Commission, the Party himself may falsify. *Id. ibid.*

3. Principal is attaint, and then the Accessary; Principal reverses his Attainder, the Attainder of the Accessary is *ipso facto* avoided. *Id. ibid.*

4. Attaint of Treason, and then the Treason is pardoned by Act of Parliament, the Party or Heir shall falsify. *Ibid. 271.*

Bail.

1. **B**Y the Statute of 31 Car. 2. cap. 2. a Writ of *Habeas Corpus* may be granted in Vacation Time by the Lord Chancellor, or any Judge or Baron of the Coif, returnable *immediate*, who are impowered to bail the Prisoner (if bailable) to appear at the King's Bench the next Term or Assizes, &c. *Sett. 3.* The Prisoner who wilfully neglects two Terms, shall not have the Benefit of a *Habeas Corpus* in the Vacation Time, *Sett. 4.* Persons committed for Felony or Treason, if not (upon their

their Petition in open Court, the first Week of the Term, or first Day of Sessions, &c.) indicted the next Term or Sessions, &c. shall be bailed, unless it appear by Oath, That the Witnesses for the King cannot be produced so soon; and if not indicted the second Term or Sessions, &c. he shall be totally discharged, *Seet. 7.* If the Lord Chancellor, or any of the Judges aforesaid, shall in the Vacation Time, upon View of the Copy of the Commitment, or Oath made that such Copy was denied, deny a Writ of *Habeas Corpus*; he shall forfeit to the Prisoner or Party grieved 500 *l.* *Seet. 10.* Sheriff or Officer neglecting or refusing to obey the Writ, or to deliver a true Copy of the Commitment within six Hours after Demand, shall forfeit to the Prisoner, for the first Offence 100 *l.* for the second Offence 200 *l.* and lose his Office, *Seet. 5.* (unless the Commitment be for Felony or Treason plainly and specially expressed in the Warrant of Commitment).

2. Persons taken for the Death of a Man; or by Command of the King or his Justices, Persons outlawed, abjured, Provers and such as are taken in the Manner, Prison-breakers, Thieves openly defamed and known, Appellees by Provers, (during the Life of such Provers) House-burners, Counterfeiters of the King's Seal or Coin, excommunicated Persons, and Traitors, are not repleviable (or bailable) by common Writ, or without Writ. *Westm. 1. (3 E. 1.) c. 15. Vide Hale P. C. 98. & infra.*

3. Persons guilty of Larceny by Inquests taken before Sheriffs or Bailiffs, or of Petty Larceny, not before detected, or accessory unto

any Felony, or only guilty of some Trespass, for which he ought not to lose Life or Member, areailable by good Sureties. *Stat. ubi sup.* To bail those who are notailable, and refuse to bail those who are, is punishable by Fine and imprisonment. *Stat. ubi supra. Hale P. C. 97.*

4. Yet the Court of King's Bench has bailed one indicted for Murder at the Quarter-Sessions in *Sussex*, the Indictment being removed by *Certiorari* into that Court, after he had been arraigned, and pleaded Not guilty. The Bail were four sufficient Persons, *Corpus pro Corpore. Farrington's Case, Mich. 34 Car. 2. 2 Jones 222.*

5. Justices of Peace cannot bail but where they have Cognizance of the Cause, and therefore if a Man be taken upon a Process of Rebellion out of Chancery, they cannot bail. *Id. 105.*

6. By the Statutes of 3 *H. 7. c. 3.* and 1 & 2 *Ph. & M. c. 13.* two Justices of Peace are impowered to bail in Case of Felony. *Hale P. C. 105.*

7. A Bail for a Prisoner cannot be a Witness for him, unless the King's Counsel consent. *Hambden's Trial 32.*

8. By *Stat. 1 W. & M. Sess. 2. c. 2.* it is declared and enacted, (*inter alia*) That excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unjust Punishments inflicted, and that all Grants and Promises of Fines and Forfeitures of particular Persons before Conviction are illegal and void.

Vide Appeal 2.

Bar.

1. Where a Man is convict upon an Indictment of Manslaughter, and hath had his Clergy, this is a Bar to an Appeal after brought, though it be of Murder, for the Fact is the same. *Hale P. C. 247.*

Baron. Peer.

1. A Baron of the Realm being a Witness, sits covered after his Evidence is over. So also where he hath been a Party in Treason, if he hath his Pardon. *Hamb. Trial 17.*

2. Evidence against the Honour of a Peer of the Realm who gives Evidence for the King, thereby to render him incredible, as to make him an Atheist, &c. not admitted. *Hamb. Trial 37, 38.*

Vide *Trial 16. Clergy 4.*

Challenge.

1. Prisoner may challenge peremptorily in Capital Cases, where his Life is concerned, but not in lesser Offences. *Reading's Trial 8.*

2. Allowed for a good Cause of Challenge to one of the Petty Jury, if he hath been of the Grand Jury that found the Bill. *Oates's 1st Trial 1.*

3. In Treason the Prisoner accused may challenge thirty-five; and therefore there is a Return generally of sixty or eighty, and when he has challenged as many as he pleases, the

twelve Men that stand next are to be of the Jury. *Lord Russel's Trial* 31.

4. Peremptory Challenge is not allowable, but where the Life of Man comes in Question. At Common Law he might have challenged peremptorily thirty-five, that is under three full Juries; if he challenged above, he should be hanged: But by the *Stat. 22 H. 8. c. 4.* made perpetual by *32 H. 8. c. 3.* it is reduced to twenty; and if he challenge above twenty, he shall not be therefore hanged, but his Challenge shall be over-ruled, and put upon his Trial: Yet *quare Hale P. C. 259.* But in Case of Treason or Petty Treason, the Challenge of thirty-five is restored by *Stat. 1 & 2 Ph. & M. 10. Hale P. C.*

Vide *Mute* 1.

Clergy.

1. Where Clergy is allowable, it is to be allowed as well where the Party is convicted by Confession, as by Verdict, and where he stands mute. *Hale P. C. 231.*

2. One admitted to his Clergy shall, notwithstanding his Purgation, answer for other Offences formerly committed, *Stat. 8 Eliz. c. 4.* Before, (by Reason of the *Stat. 25 E. 3. 5.* which says, a Clerk shall be arraigned of all his Offences at once) *Auterfoits convicted* and Clergy had been a Bar to an Arraignment of any other Felony, though not within Clergy. *Hale P. C. 249.*

This possibly may be the Occasion of that Error, which the lesser Criminals at the *Old Baily* so often use, when they plead Guilty to this and all other Felonies within the Benefit of

of Clergy; though they are as often told they can plead only to what they are indicted.

3. None shall have the Benefit of Clergy twice, unless he be really in Orders. *Stat. 4 H. 7. c. 13. Hale P. C. 239.*

4. Ecclesiastical Persons being convict of Manslaughter, and having their Clergy, shall not be burnt in the Hand, *propter ordines*, *Hob. 288, 294.* Neither shall a Baron of this Realm, in the like Case, be burnt in the Hand, *propter honorem.* *Stat. 1 Ed. 6. c. 12. sect. 14.*

5. The King may pardon Burning in the Hand after Conviction, and that as well in an Appeal as upon an Indictment: And the Burning being pardoned, he shall be delivered out of Prison of Consequence. *Co. Rep. l. 5. f. 50. Biggin's Case.*

6. A Man discharged of Burning in the Hand shall be immediately discharged of his Imprisonment. *Co. ubi sup'.* Yet the Justices, if they see Cause, may detain the Party in Prison for some Time, not exceeding a Year. *Stat. 18 Eliz. c. 7. sect. 2, 3.*

7. By the 3 & 4 W. & M. 9. it was enacted, That if a Woman should be convicted of any Offence, for which a Man might have the Benefit of his Clergy; upon her Prayer to have the Benefit of this Statute, Judgment of Death shall not be given against her, but she shall suffer the same Punishment a Man should suffer in the like Case.

8. By the same Statute, Clergy was taken away from such as should break any Dwelling-house, Shop or Warehouse thereunto belonging

Women to have the Benefit of Clergy.

Persons breaking Houses, Shops, &c. and stealing the Value of

5 s. excluded Clergy.

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ing, or therewith used in the Day-time; and feloniously take away Money or Goods to the Value of five Shillings, though no Person were therein.

Persons stealing the Value of 5 s. out of any Shop, Warehouse, &c. though not broke open, are excluded Clergy.

9. By 10 & 11 W. 3. cap. 23. it was enacted, That all Persons who by Night or Day after the 20th Day of May 1699, should in any Shop, Warehouse, Coach-house or Stable, privately and feloniously steal any Goods, &c. to the Value of five Shillings, though such Shop, &c. were not broken open, and whether the Owner or any other Person were or were not in such Shop, &c. And whoever shall assist in the committing such Offence, being thereof convicted, shall lose the Benefit of Clergy.

Reading taken away.

10. By 5 *Annæ*, cap. 6. If any Person shall be convicted of such Felony, for which he ought to have the Benefit of Clergy, and shall pray the Benefit of this Act; he shall not be required to read, but shall be punished as a Clerk convicted.

Persons stealing the Value of 40 s. out of a Dwelling-house excluded Clergy.

11. By 12 *Annæ*, cap. 7. Persons stealing Money or Goods to the Value of 40 s. out of any Dwelling-house or Out-house thereto belonging, though such House or Out-house are not broke open, they and their Accomplices are excluded the Benefit of the Act which comes in the Room of Clergy: Provided it do

Not to extend to Apprentices under fifteen.

Breaking out of a House, excluded Clergy.

not extend to Apprentices under fifteen Years of Age, who rob their Masters. Persons getting into a House by Day or Night, with an Intent to commit Felony, who in the Night-time shall break the said House to get out, shall be deemed guilty of Burglary, and excluded the Benefit of Clergy. *Ibid.*

Commitment.

Commitment.

1. People apprehended upon Suspicion of Robbery, and had before a Justice, ought not to be committed without Oath. Lord *Hollis's Narr'* of the Trial of five *French Gentlemen*, 4. 31.

2. Subjects of this Realm committed for any Crime, shall not be removed into Custody of any other Officer, unless by *Habeas Corpus*, or some other legal Writ in due Course of Law, or in Case of Fire, Infection, or other necessity. *Stat. 31 Car. 2. c. 2. sect. 9.*

3. No Person, who shall be delivered or set at large upon any *Habeas Corpus*, shall be again re-committed for the same Offence, by any Person or Persons whatsoever, other than by the legal Order or Process of such Court wherein he shall be bound by Recognizance to appear, or other Court having Jurisdiction of the Cause. *Stat. 31 Car. 2. c. 2. sect. 6.*

4. No Subject inhabiting in this Realm, shall be sent Prisoner into *Scotland, Ireland, Jersey*, or any Foreign Parts, except Persons contracting to be transported, or Felons praying Transportation. *31 Car. 2. c. 2. sect. 12, 13, 14.*

Confess. V. Overt-Act 5.

1. Parties have sometimes confessed themselves Guilty, falsely. The Case of *Harrison of Campden in Gloucestershire*, who appeared alive many Years after three had been hanged for his Murder, one of which confessed. Also the Truth of *Witches* confession against themselves.

themselves hath been often doubted; it seems therefore that there ought to be good Circumstances concurring.

Copy.

1. Copy of Indictment, or Council, in Cases of Treason, not grantable by Law. *Sidn. Trial 7.* And this, notwithstanding 46 E. 3. which (as Mr. *Sidney* alledged) provides that *tout gents* shall have a Copy of every Record. *Ibid. 9, 10.*

2. But now by the Stat. 7 W. 3. c. 3. Every Person accused or indicted for High Treason, whereby any Corruption of Blood may be made, or for Misprision of such Treason, shall have a Copy of the whole Indictment (but not the Names of the Witnesses) five Days at least before the Trial; his Attorney or Agent requiring the same, and paying Fees for Writing, not exceeding 5 s.

3. Also by the said Statute, such Person shall have a Copy of the Jurors who are to try him, at least two Days before the Trial.

4. Before the said Statute, the Prisoner might not have a Copy of the Indictment, but was sometimes indulged a Copy of the Panel, though it was not his Right. *Lord Russel's Trial 29, 30.*

Council.

1. In collateral Matters, any one may be of Council with the Prisoner, without Assignment. 2 *Jones Rep. 180.* O *Carny's Case.*

2. Prisoner

2. Prisoner hath not Council in Treason, because the Proof must be plain. *Cohn. Trial* 17. *Co. 3 Inst.* 137.

3. In those Cases where a Man can have no Council, (as Treason, &c.) the Court is of Council for him; but where he may have Council the Judges are not of Council for the Prisoner. *Oates's 1st Trial* 66.

4. Council in Treason not grantable, except in some special Point of Law; there Council may be granted. *Sidn. Trial* 7. *Co. 3 Inst.* 137.

5. But now by the Statute of 7 *W. 3. c. 3.* If any Person indicted for High Treason, whereby any Corruption of Blood may be made, or Misprision of such Treason, shall desire Council, the Court before whom he shall be tried, shall assign him such Council as he desires, not exceeding two, who shall have free Access to him at seasonable Hours.

6. A Prisoner indicted, and demanding Council, and having it, if he refuses to plead as his Council advises, Judgment shall go against him as his Crime requires. 3 *Cro.* 175. *Jesse's Case.*

7. What the Prisoner may alledge to obtain Council as to Matter of Law, see *Co. 3 Inst.* 137. viz. Such Matters as may make the Proceedings erroneous, and of such it is lawful for any Man then present in Court, to inform the Court. *Co. 3 Inst.* 29 & 137.

County.

1. In Trials of Treason, it is not material that the Fact be proved to be done in the particular Parish laid in the Indictment; it is sufficient

sufficient if proved to be done in the County, in any other Parish. *Charnock's Trial* 71 & *alibi*.

Vide Place 1. *Trial* 11, 12.

Defence.

1. **BY** *Wi. Williams*, in all Cases where a Person swears directly against a Defendant, the Defendant, or his Council, (in Case the Cause admits of Council) must endeavour to shew from Circumstances arising out of the Fact, and farther Circumstances attending the Fact, and by probable Arguments, and reasonable Inductions out of the Evidence, that the Defendant is Not guilty: This where direct Evidence of his Innocence cannot be had. *Hambden's Trial* 19.

Demurrer. Vide Plea.

Depositions.

1. In Trial for Murder, Depositions taken before the Coroner may be read for Evidence, if the Party be either Dead or beyond the Seas. *Secus*, Depositions taken before a Justice of Peace, 2 *Jones Rep.* 43. yet *Hale P. C.* 263. says, Depositions before a Justice may be read; but in Prudence the Justice or his Clerk ought to be sworn to the Truth of the Examinations.

Evidence.

Evidence in Criminal Matters.

1. **I**F a Man be indicted upon the Stat. of Stabbing, 1 Jac. 1. c. 8. and the Evidence is, that the dead Person struck first, whereby he is out of the Statute; yet this will maintain a general Indictment for Manslaughter; for this is an Indictment at Common Law as well as by the Statute; and though the Prisoner proves himself out of the Statute, yet he is not out of the Charge in the Indictment. *Gilb. Law of Evid.* 272.

2. A Witness may make use of Notes to refresh his Memory, but his Testimony must not be meerly to read them. *Coleman's Trial* 48.

3. A Man may give Evidence though he be sworn of the Jury. *Reading's Trial* 11.

4. Printed Trials not allowed to be cited for Evidence. 5 *Jes. Trial* 45. *Langborn's Trial* 17, 50.

5. Hearsay, or a Report of what another Man said, is no Evidence against the Prisoner. *Lang. Trial* 22. *Lord Russel's Trial* 48. See *postea*.

6. If a Woman were indicted for killing her Bastard, formerly the Evidence ought to have been, that she actually killed it; but now by the 21 Jac. 1. c. 21. the very endeavouring to conceal the Death is Evidence of Murder, unless she contradict it by another Proof, and prove at least by one Witness that the Child was Still-born. *Gilb. Law of Evid.* 271, 272.

7. An Approver (who is one that confessing himself guilty of a Felony accuses another of the same Crime) hath a Penny a Day; by
North

North Chief Justice, to shew that *Oates* and *Bedlows's* Maintenance from the King was no Objection against their Evidence. *Lang. Trial* 27.

8. A Copy of a Record in the Lords House would not be admitted to be given in Evidence at *Langborn's Trial*, (p. 44.) nor was he allowed to prove by Witnesses what *Oates* had affirmed in Relation to him at another Trial. *Lang. Trial* 45, 49.

9. The Journal of the House of Commons, no Evidence; because they have no Power to give an Oath, but the Proceedings of the House of Peers are Evidence, because that is a Court of Record. By *Jeffreys* Ch. Justice, *Oates's 1st Trial* 55. An Order of Court-Baron no Evidence, otherwise of the Judgment of a Court-Leet. *Id. ibid.*

10. If a Witness be sworn to a particular Thing, and speak to another Matter which he was not sworn to give an Account of, this can never be Evidence; by *Jeffreys* Chief Justice. *Oates's 1st Trial* 65.

11. Hearsay is admitted for Evidence where it is to establish another Witness's Testimony; as where a second swears that he heard the first Witness declare the same Thing formerly. *Oates's 1st Trial* 70.

12. Where two Facts are alledged of the same Man, and it be questioned whether it be the same Man, it is sufficient that it is so reported; and this is good Evidence, unless some one else of the same Name be produced. *Oates's 2d Trial* 15.

13. Indictment that *A.* gave the mortal Blow, and that *B.* and *C.* and *D.* were present and abetting, the Evidence that *B.* gave the mortal

mortal Blow, and that C. and D. were present abetting, maintains the Indictment. *Gilb. L. of Evid.* 271.

But if two are indicted as Principals, and the Evidence proves one Accessary, he must be discharged. *Gilb. L. of Evid.* 271.

14. By *Jeffreys* Chief Justice. Though in Strictness we do not chuse to admit of what others have sworn at another Trial, unless the Party be dead that swore it, yet the Prisoner is sometimes indulged so far as to be admitted to prove it. *Oates's 2d Trial* 40.

15. If a Man be indicted of Poisoning, Evidence of Stabbing does not maintain the Indictment. *Gilb. Law of Evid.* 270.

16. On an Indictment of Murder, *Self-defence* should be given in Evidence, and not pleaded, because nothing can justify a private Man's Killing another. *Gilb. Law of Evid.* 270.

17. If the Indictment be of Felony at one Day, and the Evidence of Felony at another, yet the Jury may find generally against the Prisoner; but if they give a general Verdict, the Prisoner may falsify. *Gilb. Law of Evid.* 268.

If the Indictment lay the Evidence at one Place, and the Evidence of the Fact done at another, in the same County, this will maintain the Indictment. *Ibid.* 269.

18. Evidence may be given in Treason, to shew the Temper of the Prisoner's Spirit, and how his Inclination hath been all along, tho' that be not the Thing for which he is directly called in Question. *Rouse, Tri.* 69, 70.

19. Hearsay from others is not to be applied immediately to the Prisoner; however, those Matters that are remote at first, may
serve

serve to prove there was a general Conspiracy to destroy the King and Government; and so was the constant Rule and Method about the Popish Plot, first to produce Evidence of the Plot in general. By Ch. Justice. *Sidn. Tri.* 56.

20. No Witness admitted to prove what another had formerly said in Evidence, tho' that Party be now disabled to come into Court himself. *Hamb. Trial* 31.

21. The Opinion of a Third Party against the King's Witness, on Behalf of the Prisoner at the Bar, not admitted as Evidence. As to prove that the Lord *E.* had no good Opinion of the Lord *H.* who gave Evidence against Mr. *H.* makes nothing for Mr. *H.* *Hamb. Trial* 36.

22. It is not regular to produce any Evidence without first opening it. *Rockwood's Trial* 63.

23. By the late Act for regulating Trials in Cases of Treason, 7 *W.* 3. *c.* 3. no Evidence is to be admitted of any Overt Act, that is not expressly laid in the Indictment; but it does not exclude Evidence in order to prove an Overt Act laid, though such Evidence be not laid. *Rock. Trial* 74.

24. Indictment for Murder *ex Malitiâ*, and the Evidence is for Killing without Provocation or an Offence, or that the Party was committing an unlawful Act; this is proof of Murder, for in this Case the Law implies the Circumstance of Malice. *Gilb. Law of Evid.* 273.

25. Indictment for Murder; if it be proved the Words arose on a Provocation, the Jury may

may find him guilty of Manſlaughter. *Gilb. Law of Evid.* 272.

Vide *Baron* 2. *Depositions* 1. *Examination* 3. *Trials* 3, 5.

Examination.

1. Persons accused of Manſlaughter or Felony, who for want of Bail are to be ſent to Priſon, muſt be examined before the Juſtice before he commits them, and the Accuſers bound over to appear and give Evidence againſt them at the next Gaol-Delivery, whoſe Examination muſt be taken and committed to Writing within two Days at the fartheſt, and certified by the ſaid Juſtice, with the Bonds or Recognizances of the Accuſers at the ſaid next Gaol-Delivery. *Stat.* 2 & 3 *P. & M.* c. 10.

2. Examination before a Juſtice muſt be only ſubſcribed to by the Offender, and not upon his Oath; but Examination of others muſt be upon Oath. *Hale P. C.* 262.

3. Theſe Examinations, if the Party be dead or abſent, may be given in Evidence; but not Examinations relating to a forcible Marriage; in a Trial upon the *Stat.* 3 *H. 7. c. 2.* *Hale P. C.* 263.

4. Prudence requires that the Juſtice or his Clerk be ſworn to the Truth of the Examinations. *Vide ibid.*

Exception.

Exception.

1. No Exception to Witnesses in Treason, because they have been concerned by their own shewing in the same Crime; for they are the most proper Persons to be Evidence, none being able to detect such Councils but them. *Lord Russel's Trial* 61.

Vide infra *Quashing* 1. *Indictment*. 3.

Execution.

1. Executions must be pursuant to the Judgment, and cannot be altered by the King, as in Felony from Hanging to Beheading. *Hale P. C.* 268, 272. But the King may pardon Part of the Execution, as in Treason he may pardon all but Beheading. *Hale P. C.* 272. Yet there have been some instances of beheading after Judgment in Felony; as of *Edward Duke of Somerset* in the Reign of *E. 6.* and *Mervin Lord Audley* in the Reign of *Ch. 1.* so of some Women who have been beheaded, though the Judgment is not so, neither in Felony nor Treason. *Vide Co. 3 Inst.* 211.

2. If the Sheriff or other Officer, where he ought to hang the Party attainted, according to his Judgment, or Charge, will burn or behead him, or *è converso*; the Law in this Case implieth Malice. *Co. 3 Inst.* 52.

3. If a Lieutenant or other, in Time of Peace, hang or otherwise execute any Man, by Colour of Martial Law, this is Murder. *Id. Ibid.*

Feme Covert.

1. **T**HE Wife (nor the Wife's Examination) is not to be produced or used, neither for or against her Husband. *Hale's P. C. 263. Co. Lit. fo. 6. b.* Nor the Husband against his Wife, except in Treason. *Raym. Rep. p. 1. Mary Grig's Case. Fines. V. Bail 9.*

Habeas Corpus. V. Bail 1.

Hearsay.

See *Evidence* 4, 9, 13, 14, 15.

1. **T**HE two Witnesses required in Treason, must not give Evidence only by *Hearsay. Hale P. C. 262.*

Homicide.

1. The Presence, and abetting at Homicide done by another, makes a Man guilty in that Case, as well as in the Case of Murder. 2 *Jones Rep. 55.*

Imprisonment.

1. **B**Y *Stat. M. Ch. 29.* No Freeman shall be taken, imprisoned, disseised of his Freehold, or Liberties or free Customs, outlawed, or exiled, nor otherwise destroyed, unless by
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legal Judgment of his Peers, or by the Law of the Land. And by the *Stat. 25 E. 3. c. 4.* none shall be taken, unless it be by Indictment or Presentment of lawful People of the Neighbourhood in due Manner, or by Process made by Writ original at the Common Law.

2. No Serjeant at the Mace, Bailiff, or other Officer whatsoever, shall convey or carry any Person in his or their Custody by Writ, Process or other Warrant whatsoever, to any Tavern, Ale-house, or other Victualling or Drinking-house without the voluntary Consent of the Party. *Stat. 22, 23 Car. 2. c. 2. sect. 9.*

3. If the Keeper or Under-keeper of a Prison, by too great *Durefs* of Imprisonment and by Pain, make a Prisoner that he hath in Ward to become an Appellor (or Approver) against his Will, and thereof be attainted, he shall have Judgment of Life and Member. *Stat. 14 E. 3. c. 10.* Every Imprisonment is taken and deemed in Law *Duritia, Durefs*; a little Addition to it by the Gaoler is too great *Durefs* in this Case. *Co. 3 Inst. 91.*

4. If a Gaoler keep the Prisoner more strictly than he ought of Right, whereof he dieth, this is Felony in the Gaoler by the Common Law; and this is the Cause that if a Prisoner die in Prison, the Coroner ought to sit upon him. *Id. ibid.*

5. In all Offences fineable, the Imprisonment is only to be until the Fine is paid; if the Fine be tendred, there is to be no Imprisonment at all. *1 Vent. 116.*

Vide Commitment 4.

Indictment.

Indictment.

1. The Word *Proditorie* is necessary in all Indictments of Treason, *Reding's Trial* 8. In all Indictments of Death, the Word *Percussit* is necessary, except in Case of Poisoning. *Co. Rep. lib. 5. fo. 122.* So in Rape, *Rapuit*; in Larceny, *Felonice*, *Hale P. C. 207.* In Murder, *Murdravit*; for these are *Vocabula artis.* *Co. 5 Rep. 121. b.*

2. An Indictment is no more than an Accusation, and in the Nature of the King's Count, and may be true or false. *Co. 9 Rep. f. 118. a.*

3. By the Stat. 7 W. 3. c. 3. No Indictment in Cases of Treason and Misprision of Treason, or any Process or Return thereupon, shall be quashed on the Motion of the Prisoner, for mis-writing, false or improper Latin, unless Exception for the same be made by the Prisoner or his Council, before Evidence given in Court; yet any Judgment given upon such Indictment may be reversed upon a Writ of Error. The Court understood this to be before Plea pleaded, or at least before the Jury sworn. *Rookw. Tri. p. 20. usq; 36.* But the Advantage of the Prisoner's Council slipping that Time was waived, and the Council admitted to except as to mis-writing, misspelling, false and improper Latin, before the Evidence opened; but they did not, for their Exceptions were said to be substantial, which might be moved in Arrest of Judgment after Verdict, *ub. sup.*

Vide Place, County.

T 2

Infant.

Infant.

1. Examination of an Infant of thirteen, nay of nine Years of Age, allowed in some Cases. *Hale P. C. 263.*

2. Infant within Age of Discretion kills a Man, no Felony; as if he be nine or ten Years old: But if by Circumstances it appears he could distinguish between Good and Evil, it is Felony; as if he Hide the Dead body, make Excuse, &c. but in such Cases, Execution in Prudence is respited, to obtain a Pardon. *Hale P. C. 43, 44.*

Interruption.

1. The Prisoner and his Council have been heard in the midst of summing up the Evidence by the Court, to rectify a Mistake. *Rookwood's Trial 71.*

2. No Observations ought to be made upon the Prisoner's Evidence, till he hath concluded to give all his Evidence, admitted for good Practice in Lord *Mobun's Trial* 33, 36.

Vide *Trial* 8.

Jury.

1. In Capital Cases a special Jury shall not be stricken by the Clerk of the Crown in the King's Bench, as is usual by the Secondary in Civil Causes on Trials at Bar: Thus it was ruled in the several Cases of *Fitz-Harris*, *O Carry* and *Farrington*. 2 *Jones Rep.* 222.

2. There

2. There is no Panel made in *London* of Freeholders, there being few Freeholders there capable of being impanelled, because the Estates of the City belong much to the Nobility and Gentry, who live abroad, and to Corporations; therefore in the City of *London* the Challenge of Freeholders is excepted. *Lord Russell's Trial* 31. And the *Stat. 2 H. 5. c. 3.* extends not to this Case; and so ruled in the *Lord Russell's* Case at the *Old Baily*; and it was there said, That at the Common Law Trials for Treasons might be without Freeholders of the Jury; and for Treason, Trials shall be according to Common Law; by *Stat. 1 & 2 P. & M. c. 10.* *Lord Russell's Trial* 36. But now by the *Stat. 1 W. & M. Sess. 2. c. 2.* it is declared and enacted, (*inter alia*) *That Jurors ought to be duly impanelled and returned, and Jurors which pass upon Men in Trials for High Treason ought to be Freeholders.*

3. No *Medietas Linguae* is allowed in Treason, nor in any Appeal of one Alien against another; nor shall a *Scot* be accounted an Alien to have a *Medietas Linguae*, nor *Egyptians*. *Medietas Linguae* must be prayed by the Prisoner, and the Jurors need not to be of the same Nation, but any Aliens. *Hale P. C. 260, 261. Vide Dyer 144, 145.*

Vide Challenge 2, 3.

Means.

1. IF the Indictment be of poisoning with one Poison, and it is proved with another; or killing with a Dagger, and it is proved with a Staff, yet it maintains the Indictment; for

T 3

it

it agrees in Substance and Kind, though not in the Means. But if the Indictment and Evidence differ *in specie Mortis*, as Indictment of Poisoning, Evidence of Stabbing, this maintains it not. *Hale P. C. 265.*

Medietas Linguae. Vid. Jury 3.

1. By the *Stat. 28 E. 3. c. 13. sect. 2.* all Enquests made among Aliens and Denizens, be they Merchants or other, although the King be Party, shall be one Half Denizens, and the other Half Aliens, if there be so many in the Town; if not, so many as are; and these Aliens are not required to have 40s. Freehold *per Annum.* 9 *H. 6. c. 29. n. 13.*

Mute.

1. To challenge above thirty-five, is the same as to stand Mute, and he shall have *Pain fort & dure.* But in an Appeal, standing Mute, Judgment is to be hanged; so for Felony within the Verge; and in Treason it is a Conviction. *Hale P. C. 226. Co. 2 Inst. 178.* This forfeits no Land, nor works any Corruption of Blood. *Co Lit. fo. 391.*

Noli prosequi. Vide Trial 14.

Non Compos.

1. IF a Man that is *Non Compos* kills another, this is no Felony; so of a Lunatick during his Lunacy. But he that incites a Madman

to kill another, is a principal Murderer. A Man that is drunk killeth another, this is Felony. *Hale P. C. 43.*

Oath.

1. **E**Vidence for the King always upon Oath, not so for the Prisoner till the Statute of *Q. Ann.* But in some Cases heretofore by the Statute, Evidence is to be upon Oath for the Prisoner; as 31 *Eliz. c. 4. sect. 2. & 4 Jac. 1. c. 1. sect. 27. Hale P. C. 264.*

2. Witnesses in Capital Cases against the King for the Prisoner, cannot be sworn, but the Jury is to take heed of what they say, and to be governed by it according to the Credibility of the Person and of the Matter. Lord Chief Justice in the 5 *Jes. Trial* 45. *Co. 3 Inst.* 79. says, there is not so much as *Scintilla juris* against it, and that Evidence against the Prisoner should be so plain, that nothing could be answered against it; and therefore no Evidence to be sworn against the King. 5 *Jes. Tri. ibid.* But this was before the Stat. of *Q. Ann.*

3. Now, by the Statute of 7 *W. 3. c. 3.* It is provided and enacted, that Persons accused, or tried for High Treason, whereby any Corruption of Blood may be made, or Misprision of such Treason, shall be admitted to make any Proof by lawful Witness or Witnesses who shall then be *upon Oath.*

4. To take a Man's Life away by a false Oath, is Murder; by *Scroggs* Chief Justice. *Coleman's Trial* 17.

Vide Commitment 1. Examination 2.

Overt-Act.

1. Compassing the King's Death is Treason by the Words of the Statute 25 *E. 3.* And meeting in Council to raise a Rebellion, is an Evidence of Compassing, and an *Overt-Act* declaring the same. *Lord Russel's Trial* 51, 57.

2. If a Man should be indicted only for High Treason in levying War; here a contriving to levy War is not a sufficient Evidence, without an actual War levied; but if he be indicted for compassing and imagining the Death of the King, there the contriving such a War is an *Overt-Act* of the compassing and Imagining. *Sidn. Trial* 56.

3. Though some Judges have been of Opinion that Words of themselves are not an *Overt-Act*, yet no Sage of the Law ever questioned, but that a Letter was an *Overt-Act* sufficient to prove a Man guilty of High Treason, for *Scribere est agere*. *Sidn. Trial* 56.

4. Loose Words spoken without Relation to any Act or Design are not Treason; but Arguments and Words of Perswasion to engage in a treasonable Design and Resolution, and directing and proposing the best Way for effecting it, are *Overt-Acts* of High Treason; so consulting together for such a Purpose is an *Overt-Act* of High Treason: For it is the Imagination, the Compassing and Designing the Death of the King, that is the Treason; but there is no Way of Discovery of those Imaginations in order to punish a Traitor, but by some external Act. Chief Justice in *Charnock's Trial* 65. And that which is a sufficient Manifestation

nifestation of such a Design is an *Overt-Act*.
Id. ibid.

5. By the late *Stat. 7 W. 3. c. 3.* no Person shall be indicted, tried or attainted of High Treason, whereby Corruption of Blood may be made, or Misprision of such Treason, but by the Oaths and Testimony of two lawful Witnesses, either both to the same *Overt-Act*, or one to one, and the other to another *Overt-Act* of the same Treason; unless the Party willingly in open Court confess, stand mute, or peremptorily challenge above thirty-five.

Outlawry. Vide Witnesses.

Panel.

1. **B**Y the *Stat. 7 W. 3. c. 3.* the Prisoner for High Treason, or Misprision, *shall have a Copy of the Panel of the Jurors, who are to try him, duly returned by the Sheriff, and delivered to him two Days before the Trial.* This shall be understood two Days before the Trial, after the Panel is made, and not after it is returned into the Court; for then the Trial is to commence. *Rookwood's Trial 13.*

Pardon.

1. A Pardon is good and sufficient after Indictment, though it doth not recite the same, if it hath other Words tantamount, such as *five fuit Indictatus five non.* 2 *Jones Rep. 56. vide 1 Vent. 207.*

2. A Par-

2. A Pardon takes away as well all Calumny as Liableness to Punishment, and sets an Offender right against all Objection. *Reading's Trial*

53. It takes away not only *Pœnam* but *Reatum* also. *Hob. Rep.* 81.

3. A Pardon of a Felony (though after burning in the Hand) restores a Man to be a Witness; but in case he had been convicted of Perjury, and afterwards pardoned, that would not enable him to be a Witness. *1 Vent.* 349.

4. Charter of Pardon, no Bar of Appeal, *Hale P. C.* 251. yet the King may pardon burning in the Hand upon an Appeal. *Id.* 252.

5. He that hath a Pardon, must sue forth a Writ of Allowance, specifying that he hath found Surety for his good Behaviour; which he is obliged to do by the Statute of 10 *E.* 3. c. 3. and if he afterwards breaks the Peace, the Pardon shall be void by the Statute, and he hanged for the first Offence, unless the Pardon be with a *Non obstante* to the Statute. *Hale P. C.* 252.

6. Pardon after Attainder does not make a Felon capable of being a Juryman, nor a Witness; *secus*, if burnt in the Hand. *2 Brownlow* 47. *2 Bulst.* 154. *Brown and Crasshaw's Case* urged in *Rookwood's Trial*, p. 41. But overruled, p. 42, 43. yet allowed by the Chief Justice, that this may be objected against his Credit; but this is not to be urged against his being a Witness. *Ibid.* 44.

Vide Clergy 5. *Particeps Criminis* 1, 3.

Particeps Criminis.

1. *Langborn* urged at his Trial, That if an Approver (*i. e.* one who confesses Felony committed by himself, and appeals or accuses others to be guilty of the same) be pardoned, the Appellee ought to be discharged; and for the same Reason, if those who have been *Participes Criminis* have got their Pardons, they ought not to be accounted substantial Witnesses against a Prisoner at the Bar. But this was over-ruled. *Langborn's Trial* 27.

2. No Exception to a Witness in Treason, because they have been concerned, by their own shewing in the same Crime; for they are the most proper Persons to be Evidence, none being able to detect such Councils but them. *Lord Russell's Trial* 61.

3. *Particeps Criminis*, whether pardoned or not, admitted as a Witness for the King, in High Treason, *Sidney's Trial* 13, 30. So also upon a Penal Statute, 2 *Jones Rep.* 155. the King and *Benison*.

Vide *Witnesses* 5, 9.

Peer. Vide *Baron*.

Place.

1. If the Indictment lay the Felony at one Place, the Evidence proving the Fact at another Place in the same County, maintains the Indictment. *Hale P. C.* 264.

2. Regularly he that pleads any special Matter in Cases capital, and confesseth not the Felony, if the Plea be found against him, the Felony

lony notwithstanding shall be inquired of, and therefore he shall plead over to the Felony. *Hale P. C.* 254. *Secus*, where the Prisoner demurs to the Indictment; for that amounts to a Confession of the Fact. *Co. 2 Inst.* 178. *Hale P. C.* 243.

See *Clergy* 2.

Proof.

1. To prove a Hand-Writing by Similitude, and by those who have known the Hand, though the Party was not seen to write it, was allowed sufficient Proof of a treasonable Writing, in *Sidney's Case*; for this is said to be as much Proof as the Thing is capable of, especially where the Writing was found in his Possession. *Sidn. Trial* 51. Yet *Sidney* said, it had been declared in the *Lady Car's Case*, to be no lawful Evidence in Criminal Cases. *Sidney's Trial* 32.

Quashing.

1. **I**ndictment of Manslaughter not to be quashed upon Motion, 1 *Vent.* 110. Nor Indictments of Perjury, Nuisance, or the like, but the Party must plead. *Id.* 370.

See *Indictment* 3.

Time

Time.

1. IF the Indictment be of Felony, &c. at one Day, though the Evidence be of another Day, the Jury may find generally against the Prisoner, and leave the Person concerned in Point of Time to falsify; or the Jury may find the true Day upon their Verdict. *Hale P. C. 264.*

Vide Trial 9.

Treason.

1. All Persons indicted and tried for High Treason, must either be convicted of that Crime or acquitted; they cannot be found guilty of Misprision of Treason. *Wakeman's Trial 83.*

2. In Case of Treason, two Witnesses are required by the Statute of 1 E. 6. c. 12. except Treason for counterfeiting Coin. *Hale P. C. 262.*

3. The Statute of 7 W. 3. c. 3. intitled, *An Act for regulating of Trials in Cases of Treason and Misprision of Treason*, hath enacted several Matters in relation to such Trials; for which, see Council 4. Evidence 16. Indictment 3. Copy 2. Oath 4. Overt-Act 5. Panel 1. Witnesses 20. By the said Statute there is a Limitation of Time for finding the Indictment, viz. within three Years after the Crime committed, or three Years after the 25th of March 1696, for Treasons committed before that Time: Excepted out of this Limitation, Persons designing or attempting any Assassination on the Body of the King by Poison
or

or otherwise. This Act not to extend to any Impeachment or other Proceedings in Parliament, nor to Treasons for counterfeiting the King's Coin or Seals.

Trial.

1. To desire a Trial by *Ordeal* (there being no such Trial now used) was said to be an artificial Varnish to take with the Auditory. *5 Jesh. Trial 68.*

2. By *Scrogs* Chief Justice, the Jury must not take Notice of any Thing that was done at a former Trial, unless it be spoken of now. *5 Jesh. Trial 69.* And a Prisoner must not call any Witnesses to prove what was said then, but to disprove what is said now. *Ibid. 70.*

3. Regularly the Prisoner should not ask Questions, but the Court, and the Prisoner propose the Question to the Court. *Langborn's Trial 14.*

4. The same Matter may be examined and tried over again, by another Jury in another County, though tried the Day before. *Lang. Trial 15.*

5. Incoherent Evidence hath been some Times taken favourably, and seeming Contradictions reconciled. *Wakeman's Trial 15.*

6. A Prisoner may be arraigned and tried at the same Time in Capital Crimes. *Lord Russel's Trial 59.*

7. The King's Council are to have the last Word. *Oates's 1st Trial 52.*

8. By *North* Chief Justice, the Prisoner must have Liberty to ask Questions while the Evidence is giving, because there are some Questions that else may be forgotten, and the Opportunity

portunity will be lost; but when he hath asked those Questions, he is to make his own Observations upon them in private to himself, and afterwards it will be Time for him to argue upon it, when the King's Council have done their Evidence. Before, it will do him little Service, and cannot be permitted. *Wakeman's Trial* 19. Vide supra *Interruption* 2.

9. A Criminal can demand no Time to prepare for Trial, for those who will commit Crimes, must be ready to answer for them, and defend themselves. *Rouse's Trial* 63.

10. Upon good Cause shewn, a Verdict for the King in an Information for Perjury has been set aside, and a new Trial awarded. 2 *Jones Rep.* 163. *The King and Smith.*

11. A Person examined before the King's Council, or three of them, upon any Treason, Misprision of Treason, or Murder, and confessing the same, or vehemently suspected by the said Council, the King may direct his Commission of Oyer and Terminer for trying the same, into such County or Place as he pleaseth; and here no Challenge for the County or Hundred shall be allowed. *Stat. 33 H. 8. c. 23. sect. 1.*

12. Where any Person is feloniously stricken or poisoned in one County, and dieth of the same in another County, an Indictment or Appeal may be brought in the County where the Party dies. *Stat 2, 3 E. 6. c. 24. sect. 2, 3.*

13. Justices of Peace, and Oyer and Terminer, cannot make their *Venire facias* to try an Issue returnable the same Sessions; but Justices of Gaol-Delivery may, for their Panel is returned by the Sheriff without any Precept. *Hale P. C.* 256.

14. At-

14. Attorney General may enter a *Noli prosequi*, and stop Proceedings upon an Information, at the Trial after the Jury are sworn. 1 Vent. 33.

15. Prisoners for Treason were indicted, arraigned, and in their Trial, and then the Jury were discharged of them, because but one Witness against them; and the same Persons were afterwards tried again for the same Fact, and condemned. *Ireland's Trial* 55. This was because they had not been before in Jeopardy of their Lives, (as the Court said) because the Charge of the Jury is not full, 'till the Court give them their Charge at last after the Evidence; and the Jury are sworn to try such Prisoners as they shall have in Charge. 5 Jes. Trial 5. By North Chief Justice. Bedlow being sworn to say the Truth, the whole Truth, and nothing but the Truth, in Relation to Whitebread, &c. at Ireland's Trial, said afterwards, that he did not then say all, nor half that he could have then said. 5 Jes. Trial 32. He also said in Court, I cannot prove it without bringing some Witnesses that I have behind a Curtain, and I will not discover them until another Trial (then intended). They shall not know who they are. 5 Jes. Trial 34. This though it will not take away his Evidence, yet it goes to the lessening the Credit of it; by North Chief Justice, 5 Jes. Trial 76. It was urged by Whitebread, that Bedlow being sworn to say the Truth, and the whole Truth; if he did not say the whole Truth, he is perjured; if he did, he can say nothing against me now. 5 Jes. Trial 76. But it seems a Man shall not appear perjured by a Logical Argument or Dilemma, so as to take off his Evidence, without producing a Record of his Conviction

Vide infra
Witness 12.

viction of Perjury. Yet this Case of *Whitebread*, and the Jury's being discharged of him, being cited many Years after, was said to be a singular Precedent, and the Authority hardly allowed. *Rookwood's Trial* 24.

16. By the Statute of 7 W. 3. c. 3. All Peers who have Right to sit in Parliament, shall be summoned upon Trials of any Peer or Peerefs for Treason, at least twenty Days before such Trial.

Verdict.

1. **T**HE Verdict in Cases Capital must be given openly in Court, and no privy Verdict. *Hale P. C.* 267.

Witnesses. Vide Evidence.

1. **T**WO Witnesses to the same Fact, tho' at several Times, sufficient. *Ireland's Trial* 55.

2. If a Witness denies what he formerly discovered upon Oath, he is not allowed to be perjured, so long as that Denial is not upon Oath. *Green's Trial* 23.

3. In Cases not Capital, a Witness for the Prisoner shall be sworn. *Reading's Trial* 43. But in Capital Cases, before the Stat. 2 Ann. a Witness again st the King for the Prisoner could be sworn; but the Jury is to take Heed of what they say, and to be governed by it according to the Credibility of the Person. *5 Jesh. Trial* 45.

4. *Roman Catholicks* lawful Witnesses, unless such Objection can be produced to invalidate their Evidence, as would have the same Force against Protestants. 5 *Jes. Trial* 46, 64, 70. *Oates's 2d Trial* 51, 52. It was objected against Mr *Langborn's* Witnesses, that they were Papists, and spake in a general Cause: To which he replied, That if they were not to be believed because Papists and Friends, then the other, on the contrary, are not to be believed, because they are Enemies. *Langb. Trial* 58. *Oates* cited *Bulstrode's Rep.* 2 Part 155. as my Lord *Coke's* Practice, that a Popish Recusant is not to be admitted a Witness between Party and Party. Over-ruled, as against Law. *Oates's 1st Trial* 73.

5. If a Man stand charged with the same Crime with the Prisoner, though he be not convicted, his Evidence on Behalf of the Prisoner is of little Weight. 5 *Jes. Trial* 73. *Vide infra* 9.

Vide antea
Evidence by
Witnesses.

6. A Man that hath stood in the Pillory, is counted an infamous Person, and cannot be taken for a Witness, by *North* Chief Justice. *Langborn's Trial* 28.

7. One Attaint of Conspiracy, Forgery, or Perjury, or duly set in the Pillory, not allowed to be a Witness. *Hale P. C.* 263. One convict of Perjury can never be a Witness, tho' he hath a Pardon. *Sid.* 52. A Party outlawed (of Felony) is no *legalis Testis*. *Trin.* 32 *Car.* 2. *B. R.* in *Cellier's Case*, *Sid. vid. Co. Lit.* f 6. b.

8. One convict of Perjury, *Præmunire*, Forgery, *Stigmaticus*, Pillorized, or other infamous Person; an Infidel, *Non compos*, or a Party interested, and regularly all such as lose their
liberam

liberam Legem, are not sufficient Witnesses.
Co Lit. f. 6. b.

9. In an Information in the Crown Office for a Riot, two of the Defendants (no Witnesses appearing against them) were allowed and sworn as Witnesses in Behalf of the other Defendant. *Sid. 237. The King and Bedder.*

10. A Man retained of Council for the Prisoner, or his Attorney or Solicitor, may not be examined against him, for he is obliged to keep his Secrets. *1 Vent. 197. Cuts and Pickering.*

11. It is a Maxim in Law, That Witnesses cannot testify in the Negative, but in the Affirmative only. *Co. 2 Inst. 662.*

12. A Matter may be sworn false, and yet the Witness is not guilty of Perjury 'till he be indicted, and another Jury pass upon him; for it is one Thing to be forsworn and perjured, and another Thing to be proved so; and he is not proved to be so, but by a Record for that Purpose: By *Scrogs C. J. 5 Jesh. Trial 70.*

13. Lord Chief Justice *Jeffreys* would not admit a Witness to swear, that he was forsworn at a former Trial: For he that has once forsworn himself ought not to be a Witness after that in any Case whatsoever. *Oates's 1st Trial 68.*

14. A Man is not compellable to be a Witness, unless he be *subpœna'd* (and tendered Charges, *Vide Stat. 5 Eliz. c. 9. sect 12.*) but if a Man will come without a *Subpœna*, and give Evidence in a Cause, this is no Objection to his Testimony. *Oates's 1st Trial 14.*

15. It is very unjustifiable, and indeed a very horrid Thing, and severely to be punished, for Witnesses that come on Behalf of the Prisoner, to be hindred of free Ingress and Regress, or molested or abused. By *North Ch. J.* and *Atkins Justice*, *Langborn's Trial* 45.

16. *Langborn* desired that he might examine some of his Witnesses, after the King's Council had done, but he was told he might then say what he would for his Defence, but not examine any new Witness. *Langborn's Trial* 47.

17. Witnesses may be examined to give an Account of the general Tenour of the Conversation of a Witness against a Prisoner, but not of particular Crimes. *Rookwood's Trial* 64, 65.

18. Two Witnesses, one to one particular Fact of Treason, and one to another, have been held sufficient in Law, for they are both *Overt-Acts* of the Treason. *Sir Henry Vane's Case*, and *Gaven's Case*, 5 *Jes. Trial* 87, 88. So if the *Overt-Acts* were in two several Counties, *College's Trial* 12. The two Witnesses, that the Statute (5, 6 *E. 6. c. 10. sect. 8.*) requires in Treason, are not to the same individual Act, but to the same Treason; for if there be several Acts declaring the same Treason, and one Witness to each Act, it is sufficient. *Sidney's Trial* 47, 56. *Lord Russel's Trial* 50, 59. And this was the *Lord Stafford's Case*.

19. If in Case of Treason there be but one Witness to prove a direct Treason, and another Witness to a Circumstance that contributes to that Treason, that will make two Witnesses. Resolved by all the Judges of *England*, *Sid. Trial* 59.

20. Now

20. Now, by the Stat. 7 W. 3. c. 3. Witnesses for the Prisoner shall be upon Oath, in Cases of Treason whereby Corruption of Blood may be made, or of Misprision of such Treason; and no Person shall be attainted in such Cases, but by the Oaths and Testimony of two lawful Witnesses, either both to the same *Overt-Act*, or one to one, and the other to another *Overt-Act* of the same Treason, unless the Party willingly confess in open Court, stand mute, or challenge above thirty-five peremptorily, or be attainted by Outlawry; yet if the Party outlawed comes in, and is tried, he shall have the Benefit of this Law; and where two or more distinct Treasons of divers Kinds shall be alledged in one Bill of Indictment, one Witness to one, and another Witness to another Treason shall not be deemed two Witnesses within the Meaning of this Act; and the Prisoners shall have like Process to compel their Witnesses to appear for them, as is usually granted for Witnesses against them.

Words.

Vide *Overt-Act* 4.

Writing.

Vide *Proof* 1. *Overt-Act* 3.

F I N I S.



N. B. The READER is desired to
take Notice, That *Pages* 373 to
378 are twice Numbered in the
preceding Pages; but if the
Matter in the INDEX be not
found in the one, it will be found
in the other.

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Levinz's Reports.

A few remaining Copies of Hale's Pleas of the Crown, 2 Vols.

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